LIBRARY
SUPREME COURT, U.S.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1951

## No. 305

CITIES SERVICE COMPANY, AND THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, PETITIONERS,

*vs.*

J. HOWARD McGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 8, 1951.

CERTIORARI GRANTED NOVEMBER 5, 1951.

# INDEX


| | PAGE |
|---|---|
| Statement Under Rule XV | 1 |
| Complaint | 3 |
| Exhibit "A"—Vesting Order 12960 | 8 |
| Exhibit "B"—Letter dated March 28, 1949 | 11 |
| Exhibit "C"—Letter dated June 17, 1949 | 13 |
| Exhibit "D"—Letter dated January 5, 1950 | 18 |
| Answer of Chase National Bank | 21 |
| Answer of Cities Service Company | 29 |
| Stipulation of Facts | 32 |
| Exhibit "1"—Letter dated May 19, 1949 | 35 |
| Notice of Motion of Plaintiff for Judgment on the Pleadings or for Summary Judgment | 37 |
| Notice of Motion of Chase National Bank for Judgment Dismissing the Complaint or for Summary Judgment | 39 |
| Notice of Motion for Cities Service Company for Judgment Dismissing the Complaint or for Summary Judgment | 41 |
| Opinion of McGohey, *D.J.* | 43 |

PAGE

Order and Judgment Appealed From ..... 49

Notice of Appeal ..... 51

Stipulation as to Designation of Contents of Record on Appeal ..... 53

Proceedings in U.S.C.A., Second Circuit ..... 55

Opinion, Hand, J. ..... 55

Judgment ..... 62

Clerk's certificate ..... (omitted in printing) 62

Order allowing certiorari ..... 63

# United States Court of Appeals

FOR THE SECOND CIRCUIT

55-262

J. HOWARD MCGRATH, Attorney General, as Successor to the Alien Property Custodian,

*Plaintiff-Appellant,*

—v.—

CITIES SERVICE COMPANY,

and

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

*Defendants-Appellees.*

## Statement Under Rule XV

This cause was commenced on or about January 30, 1950. The original parties are those set forth in the caption hereof.

The complaint was filed on January 30, 1950. The answer of defendant, The Chase National Bank of the City of New York, was filed on March 13, 1950. The answer of defendant, Cities Service Company, was filed on March 13, 1950. Plaintiff's notice of motion for judgment on the pleadings, or, in the alternative, for summary judgment was filed on May 26, 1950. Notice of motion of defendant, The Chase National Bank of the City of New York, for judgment on the pleadings, or, in the alternative, for summary judgment was filed on June 2, 1950. Notice of

*Statement Under Rule XV*

4 motion of defendant, Cities Service Company, for judgment on the pleadings, or, in the alternative, for summary judgment was filed on June 8, 1950.

Defendants were not arrested, no bail was taken and no property was attached or arrested. The cause came on for hearing on June 15, 1950, before the Honorable John F. X. McGohey, District Judge, United States District Court for the Southern District of New York. An opinion of the Court was filed October 24, 1950, granting summary judgment in favor of the defendants.

Final judgment was entered on November 8, 1950, granting defendants' motion for summary judgment, denying plaintiff's motion for judgment on the pleadings and for summary judgment, and dismissing the complaint on the merits. Plaintiff filed notice of appeal from said final judgment on December 3, 1950.

5

6

**Complaint**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 53-262

J. HOWARD MCGRATH, Attorney General, as Successor to the Alien Property Custodian,

*Plaintiff,*

—against—

CITIES SERVICE COMPANY

and

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

*Defendants.*

J. HOWARD MCGRATH, Attorney General, as successor to the Alien Property Custodian, by his attorney, IRVING H. SAYPOL, United States Attorney for the Southern District of New York, alleges that:

1. Jurisdiction of this Court is invoked under Section 17 of the Trading with the Enemy Act, as amended (40 Stat. 425, U. S. C. T. 50 A.), and Section 1345 of Title 28, United States Code.

2. On information and belief the defendant, Cities Service Company, is and has been at all times material hereto a corporation duly organized and existing under and by

10 virtue of the laws of the State of Delaware, and has its principal place of business in New York, New York, and within this district.

3. On information and belief the defendant, The Chase National Bank of the City of New York, is and has been at all times material hereto, a national banking association organized and existing under the laws of the United States and has its principal place of business in New York, New York, and within this district.

11 4. By Vesting Order No. 12960 issued March 11, 1949, filed with the Division of the Federal Register on March 28, 1949, and published in 14 F. R. 1405 March 29, 1949, a true copy of which is attached hereto as Exhibit A, plaintiff vested the debts or other obligations evidenced by the Cities Service Company 5% Gold Debenture Bearer Bonds Nos. M 23393, M 23318 and M 7029, of $1,000 face value each.

5. On information and belief the debentures numbered M 23293 and M 23318 were authenticated and delivered under an indenture dated as of June 2, 1930 between the
12 defendants, Cities Service Company and The Chase National Bank of the City of New York, as trustee; and that said debentures due in 1950 have been called for redemption and defendant, The Chase National Bank, as trustee, is holding funds for the purpose of paying the redemption values of these outstanding debentures.

6. On information and belief the debenture numbered M 7029 was authenticated and delivered under an indenture dated as of March 1, 1929, between the defendants,

Cities Service Company and The Chase National Bank of the City of New York, as trustee, and is due in 1969. 13

7. On or about March 28, 1949, a duly authorized representative of the plaintiff mailed to the defendant, Cities Service Company, a letter, a true copy of which is attached hereto as Exhibit B, in which was enclosed a copy of the Vesting Order.

8. By letters dated June 17, 1949 and January 5, 1950, to Cities Service Company by duly authorized representatives of the plaintiff, true copies of which letters are attached hereto as Exhibits C and D, respectively, said defendant was authorized and directed to cancel bonds Nos. M 23293 and M 23318 and to issue in lieu thereof its check representing the proceeds of redemption with accrued interest to date; and to cancel bond No. M 7029 and to issue in lieu thereof a new bond of the same series and for the same face value, said bond to have affixed thereto the number of coupons corresponding to the unredeemed coupons affixed to bond No. M 7029. 14

9. Defendants have failed and refused, and still fail and refuse, to comply with plaintiff's demand herein. 15

10. The three debentures Nos. M 23293, M 23318 and M 7029 referred to herein are not in the possession of the plaintiff, and are not obtainable by plaintiff.

11. No previous application has been made for the relief herein requested.

16 WHEREFORE, plaintiff prays:

1. That the defendants be ordered to cancel bonds Nos. M 23293 and M 23318 on their books and records, and to issue in lieu thereof their check drawn payable to the "Attorney General of the United States, Account No. 28-33518", representing the proceeds of redemption for such bonds with accrued interest to date, such interest to include all interest represented by coupons which, according to defendants' records, were not paid prior to March 28, 1949.

17

2. That defendants be ordered to cancel bond No. M 7029 on their books and to issue in lieu thereof a new bond in the name of the "Attorney General of the United States, Account No. 28-33518" of the same series and for the same face value, said bond to have affixed thereto a like number of coupons which, according to the records of the defendants, were not paid prior to March 28, 1949, and said bond to be forwarded to the Office of Alien Property, Department of Justice, Washington 25, D. C.

3. That as an alternative and instead of issuing a bond
18 to replace bond No. M 7029 defendants be ordered to cancel said bond on their books and records and issue in lieu thereof their check payable to the "Attorney General of the United States, Account No. 28-33518" representing the proceeds of redemption for such bond with accrued interest to date, such interest to include all interest represented by coupons which, according to defendants' records, were not paid prior to March 28, 1949.

4. For such other and further relief as the Court may deem proper.

Dated: New York, N. Y., January 30, 1950.

IRVING H. SAYPOL,
*United States Attorney for the Southern District of New York,*
*Attorney for Plaintiff,*

By: JAMES A. DEVLIN,
*Assistant United States Attorney*
Office and P. O. Address:
United States Court House,
Foley Square,
New York 7, New York.

(Verified January 30, 1950.)

EXHIBIT "A" ANNEXED TO COMPLAINT

Form APC-60
Rev. 6-2-47

F-28-29488-D-1

DEPARTMENT OF JUSTICE
OFFICE OF ALIEN PROPERTY

VESTING ORDER 12960

Re: Debts owing to Adline Von Campenhausen also known as Baronese Adline Von Campenhausen

Under the authority of the Trading with the Enemy Act, as amended, Executive Order 9193, as amended, and Executive Order 9788, and pursuant to law, after investigation, it is hereby found:

1. That Adline Von Campenhausen also known as Baronese Adline Von Campenhausen, whose last known address is Wehrda-Huenfeld/Hessen, Germany, is a resident of Germany and a national of a designated enemy country (Germany);

2. That the property described as follows:

a. That certain debt or other obligation, matured or unmatured, evidenced by two (2) Cities Service Company 5% Gold Debentures Bearer Bonds, of $1,000 face value each, bearing the numbers M 23293 and M 23318, and any and all rights to demand, enforce and collect the aforesaid debt or other obligation, together with any and all rights

in, to and under said bonds, including particularly, but not limited to, any and all rights of redemption, and, 25

b. That certain debt or other obligation, matured or unmatured, evidenced by one (1) Cities Service Company 5% Gold Debenture Bearer Bond, of $1,000 face value, bearing the number M 7029, and any and all rights to demand, enforce and collect the aforesaid debt or other obligation, together with any and all rights in, to and under said bond,

26

is property within the United States owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, Adline Von Campenhausen also known as Baronese Adline Von Campenhausen, the aforesaid national of a designated enemy country (Germany);

and it is hereby determined:

3. That to the extent that the person named in subparagraph 1 hereof is not within a designated enemy country, the national interest of the United States requires that such person be treated as a national of a designated enemy country (Germany). 27

All determinations and all action required by law, including appropriate consultation and certification, having been made and taken, and, it being deemed necessary in the national interest,

THERE IS HEREBY VESTED in the Attorney General of the United States the property described above, to be held,

used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in section 10 of Executive Order 9193, as amended.

[40 Stat. 411, 50 U. S. C. App. 1; 55 Stat. 839, 50 U. S. C. App. Sup. 616; Pub. Law 322, 79th Cong., 60 Stat. 50; Pub. Law 671, 79th Cong., 60 Stat. 925; E.O. 9193, July 6, 1942, 7 F.R. 5205, 3 CFR, Cum. Supp.; E.O. 9567, June 8, 1945, 10 F.R. 6917, 3 CFR, 1945 Supp.; E.O. 9788, Oct. 14, 1946, 11 F.R. 11981]

Executed at Washington, D. C., on March 11, 1949.

For the Attorney General,

(Official Seal)

(Signed) DAVID L. BAZELON

David L. Bazelon
*Assistant Attorney General*
Director, Office of Alien Property

1014-49

EXHIBIT "B" ANNEXED TO COMPLAINT

COPY

March 28, 1949

Cities Service Company,
60 Wall Street,
New York 5, New York

Gentlemen:

Enclosed is a certified copy of Vesting Order 12960 executed for the Attorney General of the United States March 11, 1949, vesting in the Attorney General "Debts owing to Adline Von Campenhausen also known as Baronese Adline Von Campenhausen".

For the purpose of identifying the account of Adline Von Campenhausen, alias, on the books and records of the Office of Alien Property, Account No. 28-33518 has been assigned.

Under paragraph 2 of Vesting Order 12960 there is now vested in the Attorney General of the United States

(a) That certain debt or other obligation, matured or unmatured, evidenced by two (2) Cities Service Company 5% Gold Debentures bearer Bonds, of $1,000 face value each, bearing the numbers M 23293 and M 23318, and any and all rights to demand, enforce and collect the aforesaid debt or other obligation, together with any and all rights in to and under said bonds, including particularly, but not limited to, any and all rights of redemption, and

(b) That certain debt or other obligation, matured or unmatured, evidenced by one (1) Cities Service

*Exhibit "B" Annexed to Complaint*

Company 5% Gold Debenture Bearer Bond, of $1,000 face value, bearing the number M 7029, and any and all rights to demand, enforce, and collect the aforesaid debt or other obligation, together with any and all rights in, to and under said bond.

You are therefore authorized and directed to note on your books and records, even though the above described bonds are in bearer form, that the Attorney General of the United States is now the owner of them.

In the near future you will be advised as to the action this office will require you to take with respect to the vested property.

Please sign the acknowledgment on the attached copy of this letter and return same in the franked addressed envelope enclosed for that purpose and advise this office of your action in the matter.

Very truly yours,

For the Attorney General:

/s/ Malcolm S. Mason
Malcolm S. Mason
*Acting Deputy Director*
Office of Alien Property

Enclosures

EXHIBIT "C" ANNEXED TO COMPLAINT

COPY

June 17, 1949

Cities Service Company,
60 Wall Street,
New York 5, New York.

Gentlemen:

Reference is made to our letter of March 28, 1949, enclosing a certified copy of Vesting Order 12960, vesting in the Attorney General debts owing to Adline Von Campenhausen also known as Baronese Adline Von Campenhausen.

By paragraph 2 of the Vesting Order there were vested in the Attorney General of the United States

(a) That certain debt or other obligation, matured or unmatured, evidenced by two (2) Cities Service Company 5% Gold Debentures Bearer Bonds, of $1,000 face value each, bearing the numbers M 23293 and M 23318, and any and all rights to demand, enforce and collect the aforesaid debt or other obligation, together with any and all rights in, to and under said bonds, including particularly, but not limited to, any and all rights of redemption, and,

(b) That certain debt or other obligation, matured or unmatured, evidenced by one (1) Cities Service Company 5% Gold Debenture Bearer Bond, of $1,000 face value, bearing the number M 7029, and any and all rights to demand, enforce and collect the aforesaid

40 debt or other obligation, together with any and all rights in, to and under said bond.

An investigation conducted by this office disclosed that the bonds mentioned in subdivisions (a) and (b) of paragraph 2 of the Vesting Order are at the present time in Germany. Under existing military regulations this office is unable to obtain the bonds.

You will note, however, from the Vesting Order, that the underlying obligations evidenced by the bonds in question, not merely the physical property (the bonds), were 41 found to be the property of Adline Von Campenhausen, alias, found by the Vesting Order to be a national of a designated enemy country (Germany). It has been held that

> "* * * For the purposes of immediate possession the determination of the Enemy Property Custodian [as to ownership and nationality] is conclusive, whether right or wrong."
>
> *Central Union Trust Company* v. *Garvan*, 254 U. S. 554, 566 (1921).

42 This decision has recently been affirmed in the case of *Silesian-American Corporation* v. *Clark*, 332 U. S. (Adv. Sh.) 469, 476-7 (1947), which also held that any person complying with a vesting order issued under the authority of the Trading with the Enemy Act, as amended, is exculpated from liability to any possible third party claimants by virtue of the provisions of Sections 7 (c) and 5 (b) (2) of the Trading with the Enemy Act, as amended. Section 7 (c) provides, in pertinent part, that

*Exhibit "C" Annexed to Complaint*

"Any payment, conveyance, transfer, assignment, or delivery of money or property made to the Alien Property Custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same." 43

And Section 5 (b) (2) provides that

"Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder." 44

Any persons claiming an interest in the property so vested are, by virtue of the provisions of Section 7 (c) of the Act, limited to proceedings against the Attorney General or the Treasurer of the United States for the recovery of the vested property or the proceeds thereof. 45

In your letter of January 11, 1949, you stated, in the case of the 5% Debentures due 1950, that these Debentures were called for redemption under date of July 28, 1947 at 102 and interest.

You are therefore authorized and directed to cancel bonds numbered M 23293 and M 23318, evidencing the debt

46 vested under paragraph 2 (a) of the Vesting Order, on your books and records and issue in lieu thereof your check representing the proceeds of redemption, with accrued interest to date. Since this office is unable to obtain the bonds and examine same in order to ascertain which coupons are still attached thereto you are also authorized and directed to include all interest represented by coupons which, according to your records, have not been presented for payment.

47 Your check representing the aforesaid proceeds of redemption, with accrued interest, is to be drawn payable to the order of the "Attorney General of the United States, Account No. 28-33518" and forwarded to the Office of Alien Property, Department of Justice, Washington 25, D. C., accompanied by a duplicate explanatory statement listing in detail the principal amount and interest payments.

With respect to bond number M 7029, you are authorized and directed to cancel this bond on your books and records and issue in lieu thereof a new bond of the same series and for the same face value. As stated before, since this office is unable to examine bond M 7029, you are requested to examine your records with respect to all coupons issued in
48 connection with this bond not yet presented for payment. The new bond, therefore, should have affixed thereto a like number of coupons which, according to your records, have not been presented for payment. The new bond is to be forwarded to the Office of Alien Property Department of Justice, Washington 25, D. C.

However, if it is impractical for you to issue a new bond in lieu of bond M 7029 you may issue your check for the redemption price thereof, with accrued interest to date,

including interest represented by coupons not yet presented for payment. This check should also be drawn payable to the order of the "Attorney General of the United States, Account No. 28-33518" and forwarded to the Office of Alien Property, Department of Justice, Washington 25, D. C.

Your prompt attention to this matter will be appreciated.

Very truly yours,

For the Attorney General:

/s/ DAVID L. BAZELON

David L. Bazelon
*Assistant Attorney General*
Director, Office of Alien Property

52 EXHIBIT "D" ANNEXED TO COMPLAINT

COPY

JDH:EJF:pjg

9-21-2222

REGISTERED MAIL

RETURN RECEIPT REQUESTED

Cities Service Company
60 Wall Street.
53 New York 5, New York

Gentlemen:

By letter dated March 28, 1949, a certified copy of Vesting Order No. 12960 was sent to you. Under this vesting order the Attorney General vested the debts or other obligations evidenced by Cities Service Company 5% Gold Debenture Bearer Bonds of $1,000 face value each, bearing the numbers M 23293, M 23318 and M 7029. By letter dated June 17, 1949 you were authorized and directed to cancel these bonds, since the original certificates were in Ger-
54 many, and to issue in lieu thereof your check representing the proceeds of redemption, with accrued interest to date, on bonds Nos. M 23293 and M 23318, including interest represented by coupons not yet presented for payment, and a new bond of the same series and for the same face value as bond No. 7029, to which should be affixed the like number of coupons which have not been presented for payment.

Reply to our demand was made by letter dated August 22, 1949, from the law offices of Millbank, Tweed, Hope and

Hadley on behalf of The Chase National Bank of the City of New York. This letter requested that authorization be granted to postpone compliance with the vesting order until the outstanding debentures themselves were obtained and presented. The reply, together with its enclosure, a copy of a letter dated July 1, 1947 from the law firm to the Office of Alien Property in connection with the vesting of obligations evidenced by two outstanding dividend checks, reviewed certain authorities and decisions, and expressed concern whether the Attorney General has the power "to vest obligations evidenced by fully negotiable debentures which appear to have been in Germany at the time the vesting order was issued" and which are still not available; and whether the immunity provisions of the Trading with the Enemy Act "would serve to protect persons who act in reliance upon orders of the Attorney General which are beyond his statutory and constitutional powers."

This Office has reviewed carefully the authorities cited, as well as the pertinent provisions of the Trading with the Enemy Act, as amended, and has concluded that the concern expressed is ill founded and that, therefore, there is no justifiable basis for further delay in complying with the direction of our letter of June 17, 1949, and with Vesting Order No. 12960.

It is our position that the issuance of the bonds created debts or obligations which were property within the United States which was subject to the Act and the authority of the Attorney General to vest as enemy property even though the bonds were payable to "bearer", and the instruments were not in the possession of the Attorney General. It is also our position that you will be fully protected by the Trading with the Enemy Act against double liability

upon compliance with the direction of June 7, 1949 and with the vesting order.

Accordingly, you are directed to comply with the demand made in our letter of June 17, 1949, with respect to the bonds Nos. M 23293, M 23318 and M 7029 by January 20, 1950. In the event that compliance is not had by that date, this Office will have to take appropriate action to enforce compliance.

I am sending a copy of this letter of Millbank, Tweed, Hope and Hadley.

Sincerely,

For the Attorney General:

/s/ HAROLD I. BAYNTON

Harold I. Baynton
Acting Director
Office of Alien Property
Department of Justice

## Answer of Chase National Bank

61

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, by its attorneys, Milbank, Tweed, Hope & Hadley, for its answer to the complaint in this action:

62

### FIRST DEFENSE.

1. With reference to the allegations of paragraph 4, admits that a purported Vesting Order No. 12960, a copy of which is attached to the complaint as Exhibit A, was issued and published as alleged; but denies that the Vesting Order was valid and effective; and denies that it vested debts or obligations evidenced by Cities Service Company's 5% Gold Debenture Bearer Bonds Nos. M 23293, M 23393, M 23318 and M 7029, or any of them; and further denies that any debt or obligation evidenced by Debenture No. M 23293 or its coupons or any other right thereunder, except any debt 63 or obligation evidenced by eight unpaid coupons, existed at the time of the purported vesting or now exists.

2. With reference to the allegations of paragraph 5, denies that the Chase National Bank, as Trustee, is holding funds for the purpose of paying the redemption value of the Debenture No. M 23293, and alleges that the said debenture was redeemed on or before July 26, 1948; and that before the issuance of Vesting Order No. 12960 all coupons thereof

64 except the coupons maturing between December 1940 and June 1944 were paid and the said debenture and all of its paid coupons were cremated.

3. With reference to the allegations of paragraph 8, admits the sending and receipt of the letters, copies of which were annexed as Exhibits C and D to the complaint, but denies that the plaintiff thereby effectively authorized or could authorize the actions therein called for and denies that plaintiff has made proper demand for the possession of the property attempted to be vested.

65 4. With reference to the allegations of paragraph 10: (a) alleges that it is without knowledge or information sufficient to form a belief as to whether Debenture No. M 23318 is obtainable by plaintiff; (b) on information and belief, denies that Debenture No. M 7039 is unobtainable by plaintiff.

SECOND DEFENSE

5. The complaint fails to state a claim against defendants upon which relief can be granted.

66 THIRD DEFENSE

6. The plaintiff has asserted that the debentures listed in Vesting Order No. 12960 were not within the United States or any of its possessions at the time of the purported vesting. If so, the property sought to be vested was not property within the United States at the time of the purported vesting.

7. Vesting Order No. 12960 and the directions in Exhibits C and D were and are invalid and ineffective because

not within the provisions of, or authorized by, Executive Order No. 9193, as amended (7 F. R. 5205, 10 F. R. 6917). 67

FOURTH DEFENSE

8. Vesting Order No. 12960 and the directions in Exhibits C and D annexed to the complaint were and are invalid and ineffective, in that they were not issued under authority of or in accordance with the provisions of the Trading with the Enemy Act, as amended (50 U. S. Code App. §§1 et seq.). 68

FIFTH DEFENSE

9. Vesting Order No. 12960 and the directions in Exhibits C and D annexed to the complaint, if in accord with the provisions of the Trading with the Enemy Act, as amended, and the Trading with the Enemy Act, as amended, to the extent that it authorizes the order or the directions in the above-mentioned exhibits, are, and each of them is, unconstitutional and void as contrary to the provisions of the Fifth Amendment of the United States Constitution.

SIXTH DEFENSE 69

10. Vesting Order No. 12960 and the directions contained in Exhibits C and D annexed to the complaint were and are beyond the power of the plaintiff to issue or make and beyond the power of Congress to authorize.

SEVENTH DEFENSE

11. The obligations here purported to be vested have been merged, respectively, in Debentures Nos. M 23293,

70 M 23318 and M 7029 and the coupons thereof, all of which were negotiable bearer instruments. None of the said instruments is now in the possession or control of the defendant The Chase National Bank of the City of New York; and, upon information and belief, none is in the possession or control of either the plaintiff or defendant Cities Service Company.

12. Debenture No. M 23293 has been paid and it and all its paid coupons have been cremated.

71 13. The person presently in possession of Debenture No. M 23318 and of any unpaid coupons thereto appertaining is unknown to the Chase National Bank, but if the assertions of plaintiff are true, is not within the United States or subject to the jurisdiction of this Court.

14. On information and belief, Dominick & Dominick, 14 Wall Street, New York 5, N. Y., at the present time has possession of Debenture No. M 7029 and any unpaid coupons appertaining thereto. Dominick & Dominick is a partnership doing business within the Southern District of New York and is subject to the jurisdiction of this Court.

72 15. The persons having possession of Debentures Nos. M 23318 and M 7029 are indispensable parties to the present action.

EIGHTH DEFENSE

16. At the time of the purported vesting there did not and at the present time there does not exist any obligation on the part of either the Cities Service Company or the Chase National Bank (1) to issue a new debenture or

coupons in lieu of Debenture No M 7029 or its unpaid 73
coupons or (2) to pay the amount of Debenture No. M 23318 or Debenture No. M 7029 or interest thereon or unpaid coupons thereof, except upon presentation and surrender thereof or satisfactory evidence of loss, destruction or mutilation thereof together with adequate indemnity. Vesting Order No. 12960 purported to and could vest only existing obligations.

17. Debenture No. M 23318 was issued under the Indenture dated as of June 2, 1930, between the defendant Cities Service Company and The Chase National Bank of the 74
City of New York, as Trustee, which contains a specification of the rights thereunder of the debenture holders and the Trustee. Debenture No. M 7029 was issued under the Indenture dated as of March 1, 1929 between defendant Cities Service Company and The Equitable Trust Company of New York, as Trustee, which contains a specification of the rights thereunder of the debenture holders and the Trustee. The Chase National Bank of the City of New York has succeeded the Equitable as Trustee under the above-mentioned Indenture dated as of March 1, 1929.

18. Debentures Nos. M 23318 and M 7029 were negoti- 75
able bearer instruments and as such require payment only to the bearer thereof. The debentures expressly provided for the payment of interest thereon only upon presentation and surrender of coupons thereto attached. Each coupon attached to each of the above-mentioned debentures required payment only to the bearer thereof upon surrender of the coupon.

19. The debentures issued under the Indenture dated as of June 2, 1930, including Debenture No. M 23318, were

76 called for redemption prior to the issuance of Vesting Order No. 12960; and the Chase National Bank is now holding, as Trustee, funds for the purpose of paying the redemption value of such debentures called for redemption as are still outstanding, as and when they are presented to it for payment in accordance with the Indenture. Article IV, Section 3 of the Indenture, provides with reference thereto:

"* * * All moneys deposited by the Company with the Trustee for redemption of Debentures under the pro-
77 visions of this Article, shall be received for account of the holders of the Debentures to be redeemed and shall be paid to them, respectively, upon the presentation and surrender of their Debentures with all unmatured coupons appertaining thereto. * * * All Debentures so surrendered for redemption and all coupons thereto appertaining shall be forthwith cancelled and shall thereafter be cremated by the Trustee, which shall deliver its certificate thereof to the Company; and no Debentures shall be issued in lieu thereof."

The Indenture dated as of June 2, 1930, does not authorize
78 or provide for payment of any coupons except upon presentation and surrender thereof. Plaintiff has not presented or surrendered or offered to present or surrender Debenture No. M 23318 or any coupons appertaining thereto, and under the terms of the aforementioned Indenture is not entitled to receive an amount representing the proceeds of redemption of the aforementioned debenture or interest thereon or the amount of any coupons thereof.

20. Debenture M 7029, due in 1969, issued under the Indenture dated as of March 1, 1929, had not been called for

redemption at the time of the issuance or publication of Vesting Order No. 12960. Under that Indenture, the Trustee is authorized to authenticate and deliver additional debentures in only two classes of cases: (1) under Article II, Section 1, if the aggregate principal amount of Debentures authorized under the Indenture has not already been authenticated and delivered, or (2) under Article II, Section 9, upon receipt by the Company and the Trustee of evidence satisfactory to both of them that any outstanding Debenture has been mutilated, destroyed, lost or stolen, and of indemnity satisfactory to both of them. The aggregate amount of debentures authorized under the Indenture dated as of March 1, 1929 has already been authenticated and delivered. The plaintiff has not claimed that Debenture No. M 7029 has been mutilated, destroyed, lost or stolen nor has it offered any evidence of such mutilation, destruction, loss or theft, or any indemnity. Neither the defendant The Chase National Bank of the City of New York nor defendant Cities Service Company has authority under the terms of the aforementioned Indenture to cancel Bond No. M 7029 on its books or to issue a new bond in lieu thereof either with or without affixing thereto a number of coupons equal to the number not paid prior to March 28, 1949.

21. No provision is made under the Indenture dated as of March 1, 1929, for the payment of an amount representing the proceeds of redemption for a bearer debenture issued thereunder, or for payment of interest thereon, or for payment of unpaid coupons thereof, without presentation and surrender of such debenture and such unpaid coupons. Plaintiff has not presented or surrendered or offered to present or surrender Debenture No. M 7029 or any of the

82 unpaid coupons thereof, and under the terms of the aforementioned Indenture is not entitled to receive the proceeds of redemption for that debenture or interest thereon or the amount of any coupons thereof.

WHEREFORE, the defendant, The Chase National Bank of the City of New York prays judgment dismissing the complaint.

MILBANK, TWEED, HOPE & HADLEY,

By TIMOTHY N. PFEIFFER
83 a partner

*Attorneys for defendant*
*The Chase National Bank of the*
*City of New York*

84

**Answer of Cities Service Company**

85

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CIV. 55-262

[SAME TITLE]

Defendant, CITIES SERVICE COMPANY, by its attorneys Frueauff, Burns, Ruch & Farrell, answering the complaint in this action:

86

1. Admits the allegations of paragraph 1 of the complaint.

2. With reference to the allegations of paragraph 2 of the complaint, admits that defendant, Cities Service Company, is and has been at all times material hereto a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and has a place of business in New York, New York within this district; but denies that the principal place of business of Cities Service Company is in New York, New York.

87

3. Admits the allegations of paragraph 3 of the complaint.

4. With reference to the allegations of paragraph 4 of the complaint, admits that a purported Vesting Order No. 12960, a copy of which is attached to the complaint as Exhibit A, was issued and published as alleged; but denies that the Vesting Order was valid and effective; and denies that it vested debts or obligations evidenced by Cities

88 Service Company's 5% Gold Debenture Bearer Bonds Nos. M 23293, M 23393, M 23318 and M 7029, or any of them; and further denies that any debt or obligation evidenced by Debenture No. M 23293 or its coupons, or any other right thereunder existed at the time of the purported vesting or now exists, except any debt or obligation represented by eight unpaid coupons which matured between December, 1940, and June, 1944.

5. Admits that the debentures numbered M 23293 and M 23318 were authenticated and delivered under an In-
89 denture dated as of June 2, 1930 between the defendants, Cities Service Company and The Chase National Bank of the City of New York, as trustee, and that said debenture numbered M 23318 has been called for redemption and defendant, The Chase National Bank, as trustee, is holding funds for the purpose of paying the redemption value of said debenture numbered M 23318; but denies that defendant The Chase National Bank, as trustee, is holding funds for the purpose of paying the redemption value of said debenture numbered M 23293.

6. Admits the allegations of paragraph 6 of the
90 complaint.

7. Admits the allegations of paragraph 7 of the complaint.

8. With reference to the allegations of paragraph 8, admits the sending and receipt of the letters, copies of which were annexed as Exhibits C and D to the complaint, but denies that the plaintiff thereby effectively authorized or could authorize the actions therein called for and

denies that plaintiff has made proper demand for the possession of the property attempted to be vested. 91

9. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the complaint except as herein stated. Defendant, Cities Service Company, admits that it has not complied with plaintiff's demand as set forth in paragraph 8 of the complaint.

10. With reference to the allegations of paragraph 10, admits that the debenture numbered M 23293 is not in the possession of the plaintiff; but denies having knowledge or information sufficient to form a belief as to the truth of the allegations that the debentures numbered M 23318 and M 7029 are not in the possession of the plaintiff, and are not obtainable by the plaintiff. 92

11. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the complaint.

WHEREFORE, the defendant, Cities Service Company, demands judgments dismissing the complaint in this action. 93

Dated: New York, N. Y.
March 13, 1950.

FRUEAUFF, BURNS, RUCH & FARRELL

By B. M. SHANLEY 2ND
*A Member of the Firm*

*Attorneys for the Defendant*
*Cities Service Company*
60 Wall Street
New York 5, N. Y.

## Stipulation of Facts

94

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 55-262

[SAME TITLE]

It is hereby stipulated and agreed that no claim is to
95 be made in this action with respect to Debenture No. M 23293 or its coupons or the obligation represented thereby, the said debenture having been paid prior to the issuance of Vesting Order No. 12960, and the Complaint in this action is to be treated as amended accordingly.

The following facts are likewise stipulated and agreed to for the purposes of this action:

1. Debenture No. M 7029 was presented for redemption at the offices of the Chase National Bank in New York by Fiduciary Trust Company of New York on behalf of Globe & Rutgers Fire Insurance Company on January 5,
96 1950. The following legend was then typed on the debenture:

> Vesting Order No. 12960 has purported to vest in the Attorney General of the United States the obligation evidenced by this Debenture, with all rights in, to and under this Debenture.
>
> Federal Register, March 29, 1949, page 1405

The Chase National Bank of the City of New York, 97
Trustee

By D. P. STEWART (Signed)
*Corporate Trust Officer*

Subsequently, purportedly under the rules of the New York Curb Exchange, the Debenture was returned to Dominick & Dominick, a brokerage firm located in New York City, against replacement of a new bond or the purchase price, and the Debenture is now in the possession of that firm.

98

2. The present whereabouts of Debenture No. M 23318, last reported in Berlin, are unknown. In response to an official inquiry from the Branch Office of the Office of Alien Property in Germany, the Deutsche Bank, located in the Soviet Sector of Berlin, by letter dated May 19, 1949, advised that the Cities Service Company 5% Gold Debenture Bearer Bonds Nos. M 23293, M 23318 and M 7029 had been seized and transferred by the local occupying authorities and that, therefore, the debentures were not at present at their disposal. A copy of the communication is attached as Exhibit 1. Information in the 99
possession of the Government indicates that the Debentures had been held in the Russian Sector of Berlin prior to the issuance of Vesting Order No. 12960 and that the seizure by the occupying authorities occurred prior to the issuance of the Vesting Order.

3. A copy of the Indenture dated as of March 1, 1929, under which Debenture No. M 7029 was authenticated and delivered, and a copy of the Indenture dated as of June 2, 1930, under which the Debenture No. M 23318 was

100 authenticated and delivered, are available, and provisions thereof may be referred to or, if the court desires, copies will be presented to it.

4. Debentures Nos. M 7029 and M 23318 are negotiable bearer instruments.

5. Photostats of sample instruments issued under the above-mentioned indentures are attached as Exhibits 2 and 3.

101 Dated: May 25, 1950.

IRVING H. SAYPOL
*Attorney for Plaintiff*

FRUEAUFF, BURNS, RUCH & FARRELL
*Attorneys for Cities Service Company*

MILBANK, TWEED, HOPE & HADLEY
*Attorneys for The Chase National Bank of the City of New York*

102

## EXHIBIT "1" ANNEXED TO STIPULATION OF FACTS

103

Deutsche Bank
Berlin W.30 Viktoria-Luise-Platz 9
Cable Address: DEUTSTADT
Telephone: 242627

Reichsbank-Giro-Acct:
Berlin 1/701

Postal Acct: Berlin West
No. 25363

United States
Department of Justice, Overseas Branch
Munich 27—Mauerkircherstr. 59

104

In reply please refer to:
Depotabt. L/Re.

Your letter:
April 29, 1949

Your reference:
Berlin W30:HL:RVP:EAJ:cn May 19, 1949

Subject:
Adline von Campenhausen, Wehrda-Haenfeld/Hessen
MGAZ—Depot no. 523/01750 Deutsche Bank Branch Heidelberg

105

Town—Office under BKO (45) 3.

---

Upon your request we want to inform you that the following items referred to by you in your letter,

$2,000 5% Cities Service Comp. Gold Dbt.
per June 1, 1950 J/D M 23318, M 23293

*Exhibit "1" Annexed to Stipulation of Facts*

106 $1,000 5% dtc. per March 1, 1969 M/S M 7029

—both items not shares (Aktien)—

cannot be photostated as these securities together with others deposited in our vaults have been seized and transferred by the local occupying authorities. These debentures, therefore, are at present not at our disposal.

Truly yours,

DEUTSCHE BANK

107 (signatures illegible)

1 108

**Notice of Motion of Plaintiff for Judgment on the Pleadings or for Summary Judgment** 109

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 55-262

[SAME TITLE]

To: 110

Frueauff, Burns, Ruch & Farrell
60 Wall Street
New York 5, New York

Milbank, Tweed, Hope & Hadley
15 Broad Street
New York 5, New York

SIRS:

PLEASE TAKE NOTICE THAT at a motion term of this Court, to be held in Room 506, United States Courthouse, Foley Square, New York, New York, on the thirteenth day of June, 1950, at ten thirty in the forenoon, or as soon thereafter as counsel may be heard, plaintiff will move the Court: 111

1. For judgment on the pleadings pursuant to Rule 12 of the Federal Rules of Civil Procedure; or

2. For a summary judgment in plaintiff's favor pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the ground that there is no genuine issue as to any material

*Notice of Motion of Plaintiff for Judgment on the Pleadings or for Summary Judgment*

112

fact, and that plaintiff is entitled to a judgment as a matter of law.

The motion for summary judgment is based upon

(a) The pleadings,

(b) The stipulation between the attorneys for the parties.

Dated: May 25, 1950.

113

IRVING H. SAYPOL,
*United States Attorney for the Southern District of New York*

114

**Notice of Motion of Chase National Bank for Judgment Dismissing the Complaint or for Summary Judgment** 115

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 55-262

[SAME TITLE]

PLEASE TAKE NOTICE that the plaintiff having served notice that it will move this Court at a Motion Term thereof to 116
be held in Room 506, United States Court House, Foley Square, New York, N. Y., on the 13th day of June, 1950, at 10:30 A. M. or as soon thereafter as counsel can be heard for judgment on the pleadings or for summary judgment, the defendant The Chase National Bank will make a cross motion at the same time and place:

1. On the pleadings for judgment thereon dismissing the complaint pursuant to Rule 12(c) of the Federal Rules of Civil Procedure on the grounds that the complaint fails to state a claim upon which relief can be granted, that indis- 117
pensable parties have not been joined and that the defenses stated in the answer of the defendant The Chase National Bank are complete and sufficient as a matter of law; or in the alternative

2. On the pleadings herein and the stipulation between the attorneys for the parties for summary judgment in favor of the defendants pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that the plaintiff has failed to establish a proper basis for relief, that indis-

*Notice of Motion of Chase National Bank for Judgment Dismissing the Complaint or for Summary Judgment*

18

pensable parties have not been joined, and that no material fact is in issue necessary to establish that the defenses stated in the answer of the defendant The Chase National Bank are sufficient as a matter of law.

Dated: New York, N. Y., June 1, 1950.

MILBANK, TWEED, HOPE & HADLEY
By TIMOTHY N. PFEIFFER
a partner

19

*Attorneys for defendant The Chase National Bank of the City of New York.*

To:

IRVING H. SAYPOL,
*United States Attorney for the Southern District of New York,*
*Attorney for the plaintiff,*
United States Court House,
Foley Square,
New York, N. Y.

20

FRUEAUFF, BURNS, RUCH & FARRELL,
*Attorneys for defendant Cities Service Company,*
60 Wall Street,
New York 5, N. Y.

## Notice of Motion for Cities Service Company for Judgment Dismissing the Complaint or for Summary Judgment

121

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

PLEASE TAKE NOTICE that the plaintiff having served notice that it will move this Court at a Motion Term thereof to be held in Room 506, United States Court House, Foley Square, New ~~York,~~ N. Y., on the 13th day of June, 1950, at 10:30 A. M. or as soon thereafter as counsel can be heard for judgment on the pleadings or for summary judgment, the defendant Cities Service Company will make a cross motion at the same time and place:

122

1. On the pleadings for judgment thereon dismissing the complaint pursuant to Rule 12(c) of the Federal Rules of Civil Procedure on the ground that the complaint fails to state a claim upon which relief can be granted, that indispensable parties have not been joined and that the defenses stated in the answer of the defendant Cities Service Company are complete and sufficient as a matter of law; or in the alternative

123

2. On the pleadings herein and the stipulation between the attorneys for the parties for summary judgment in favor of the defendants pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that the plaintiff

*Notice of Motion of Cities Service Company for Judgment Dismissing the Complaint or for Summary Judgment*

124 has failed to establish a proper basis for relief, that indispensable parties have not been joined, and that no material fact is in issue necessary to establish that the defenses stated in the answer of the defendant Cities Service Company are sufficient as a matter of law.

Dated: New York, N. Y., June 6, 1950.

FRUEAUFF, BURNS, RUCH & FARRELL

By B. M. SHANLEY 2ND

125 a partner

*Attorneys for defendant Cities Service Company.*

To:

IRVING H. SAYPOL,
*United States Attorney for the Southern District of New York,*
*Attorney for the plaintiff,*
United States Court House,
Foley Square,
New York, N. Y.

126

MILBANK, TWEED, HOPE & HADLEY
*Attorneys for defendant The Chase National Bank of the City of New York,*
15 Broad Street,
New York 5, N. Y.

**Opinion of McGohey, *D.J.***

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 55-262

[SAME TITLE]

Appearances:

IRVING H. SAYPOL
*United States Attorney for the Southern District of New York,*
*Attorney for Plaintiff*

By: James A. Devlin
*Assistant United States Attorney*

George B. Searls
Edward J. Friedlander
*Attorneys, Office of Alien Property*
Department of Justice,
Washington 25, D. C.

MILBANK, TWEED, HOPE & HADLEY
*Attorneys for The Chase National Bank of the City of New York*

By: Timothy N. Pfeiffer

15 Broad Street
New York 5, New York

FRUEAUFF, BURNS, RUCH & FARRELL
*Attorneys for Cities Service Company*
60 Wall Street
New York 5, New York

130 McGOHEY, *D.J.*

Each party moves either for judgment on the pleadings or for summary judgment. There appears to be no issue between the parties as to any material fact.

Vesting Order 12960, executed March 11, 1949, vested in the Attorney General as successor to the Alien Property Custodian as "property within the United States owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, Adline von Campenhausen" an
131 enemy alien

a. That certain debt or other obligation, matured or unmatured, evidenced by two (2) Cities Service Company 5% Gold Debentures Bearer Bonds, of $1,000 face value each, bearing the numbers M 23293 and M 23318, and any and all rights to demand, enforce and collect the aforesaid debt or other obligation, together with any and all rights of redemption, and,

b. That certain debt or other obligation, matured or unmatured, evidenced by one (1) Cities Service Company 5% Gold Debenture Bearer Bond, of $1,000
132 face value, bearing the number M 7029, and all rights to demand, enforce and collect the aforesaid debt or other obligation, together with any and all rights in, to and under said bond.

On January 5, 1950, after some previous correspondence, the Office of Alien Property authorized and directed defendant Cities Service Company to cancel bonds M 23293 and M 23318 and to issue to the Attorney General in lieu thereof its check representing the proceeds of redemption

with accrued interest. These two bonds had been called 133
for redemption prior to the issuance of the Vesting Order. Cities Service Company was also authorized and directed to cancel bond M 7029 and to issue to the Attorney General a new bond of the same series for the same face value and having affixed thereto the number of coupons corresponding to the unredeemed coupons affixed to M 7029, or, alternatively, to issue a check for the redemption price and accrued interest. This bond matures in 1969.

This action was brought January 30, 1950, to enforce the above demands. Defendant Chase National Bank is 134
the present trustee under the indentures under which the bonds were issued.

The parties have stipulated that no claim is to be made with regard to M 23293 because it was paid prior to the issuance of the Vesting Order. M 7029 was presented for redemption in New York by Fiduciary Trust Company of New York on behalf of Globe & Rutgers Fire Insurance Company on January 5, 1950. It was not redeemed. A notation of the issuance of the Vesting Order was made on the debenture and it was then returned to Fiduciary Trust Company. It is now apparently in the possession of a New York brokerage firm. The parties have stipulated 135
that

> The present whereabouts of Debenture No. M 23318, last reported in Berlin, are unknown. In response to an official inquiry from the Branch Office of the Office of Alien Property in Germany, the Deutsche Bank, located in the Soviet Sector of Berlin, by letter dated May 19, 1949, advised that * * * M 23293, M 23318 and

136 M 7029 had been seized and transferred by the local occupying authorities and that, therefore, the debentures were not at present at their disposal. * * * Information in the possession of the Government indicates that the Debentures had been held in the Russian Sector of Berlin prior to the issuance of Vesting Order No. 12960 and that the seizure by the occupying authorities occurred prior to the issuance of the Vesting Order.

The Trading with the Enemy Act §5(b)(1) authorizes
137 the vesting of alien property "subject to the jurisdiction of the United States." Executive Order 9095 §2(c), as amended, issued by authority of the Trading with the Enemy Act, authorizes the Alien Property Custodian to vest property "within the United States." The Government does not contend that the certificates were within or subject to the jurisdiction of the United States. Its position, as indicated by the Order's description of the property sought to be vested, is that the certificates are to be distinguished from the "debt or other obligation" and that, though the certificates were abroad, the "debt or other obligation" was within or subject to the jurisdic-
138 tion of the United States and so could be vested.

The question whether in these circumstances there existed at the time of the issuance of the Vesting Order a "debt or other obligation" within or subject to the jurisdiction of the United States turns on the nature of these negotiable bearer bonds.[1]

---

1 The parties have stipulated that they are negotiable bearer bonds.

"Bonds have never been considered only as evidences of obligation; from the earliest times they have been treated as the very obligations, and that notion persists." [2]

The restatement of Conflict of Laws §52, comment *a* declares: "A negotiable instrument is a document embodying a right; and the state which has jurisdiction of the document has jurisdiction of the right." The illustration thereunder seems precisely in point here: "A negotiable promissory note for the payment of $100 is made in state X by A, payable in the same state to B. B indorses the note to a bank, which holds it in its vaults in state Y. The obligation embodied in the note is subject to the jurisdiction of Y." Under this principle it would seem clear that the "debt or other obligation" sought to be reached by the Vesting Order was not within or subject to the jurisdiction of the United States.

The United States Treasury Department takes the same view in the analogous problem of taxation of estates of non-resident aliens. Regulation 105, §81.50 provides: "Real estate, tangible personal property, and the written evidence of intangible personal property which is treated as being the property itself are within the United States if physically situated therein. For example, a bond for the payment of money is not within the United States unless physically situated therein."

The Trading with the Enemy Act and Executive Order 9095 purport to be concerned not with all property any-

---

2 L. Hand, *C.J.* in *Bozant* v. *Bank of New York*, 2 Cir., 156 F. 2d 787, 790; citing *Bacon* v. *Hooker*, 177 Mass. 335, 337, 58 N. E. 1078; *Blackstone* v. *Miller*, 188 U. S. 189, 206 (Holmes, *J.*: "Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it. * * *"); *United States Fidelity & Guaranty Co.* v. *Kiefler*, 239 U. S. 17, 25. See, 6 Williston, Contracts 5311 (Rev. Ed.).

142 where, but only with property "subject to the jurisdiction of the United States" or "within the United States." Vesting Order 12960 attempts to reach a "debt or other obligation" which is not within or subject to the jurisdiction of the United States. It is, therefore, without the authority of the Executive Order and the Act, and, consequently the defendants must have summary judgment.

Because of the view I have taken I do not come to a consideration of the other questions raised by the parties.

Settle order on notice.

143 Dated, New York, N. Y., October 24, 1950

JOHN F. X. McGOHEY
*U. S. D. J.*

144

**Order and Judgment Appealed From**

145

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 55-262

[SAME TITLE]

Plaintiff having moved this Court for judgment on the pleadings herein pursuant to Rule 12 of the Rules of 146
Civil Procedure or for summary judgment pursuant to Rule 56, and each of the defendants having made a cross motion for judgment on the pleadings pursuant to Rule 12(c) or in the alternative for summary judgment pursuant to Rule 56, and said motions having duly come on to be heard on June 15, 1950, and plaintiff having appeared by Irving H. Saypol (George B. Searls and Edward J. Friedlander, of counsel), his attorney, and defendant Cities Service Company having appeared by Frueauff, Burns, Ruch & Farrell (Albert R. George, of counsel), its attorneys, and defendant The Chase National Bank of the City of New York having appeared by Milbank, Tweed, Hope & 147
Hadley (Timothy N. Pfeiffer and Rebecca M. Cutler, of counsel), its attorneys, and the Court having considered the complaint and answers herein and the stipulation among attorneys for the parties dated May 25, 1950, and having heard oral arguments, and due deliberation having been had thereon, and the Court having found there is no issue as to any material fact and having concluded that the defendants are entitled to judgment as a matter of law, and having rendered and filed its written opinion on October 25, 1950;

148 Now, on motion of Milbank, Tweed, Hope & Hadley, attorneys for defendant The Chase National Bank of the City of New York, and Frueauff, Burns, Ruch and Farrell, attorneys for defendant Cities Service Company, it is hereby

ORDERED that the motion of each of said defendants for summary judgment be and the same hereby is granted; and it is further

ORDERED that the motion of the plaintiff for judgment
149 on the pleadings or for summary judgment be in all respects denied; and it is further

ORDERED AND ADJUDGED that the complaint herein be and the same hereby is dismissed on the merits.

Dated: November 6, 1950.

JOHN F. X. McGOHEY
*United States District Judge*

Judgment Entered

150 WILLIAM V. CONNELL
*Clerk*

November 8, 1950

U. S. District Court
Filed 11:20 A. M.
November 8, 1950
S. D. of N. Y.

## Notice of Appeal

151

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 55-262

J. HOWARD MCGRATH, Attorney General, as Successor to the Alien Property Custodian,

*Plaintiff,*

—v.—

152

CITIES SERVICE COMPANY,

and

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

*Defendants.*

SIRS:

Notice is hereby given that J. Howard McGrath, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the final order and judgment, dated November 6, 1950, and entered herein on November 8, 1950.

153

Dated: New York, N. Y., December 6, 1950.

*Notice of Appeal*

154

Yours, etc.

IRVING H. SAYPOL
*United States Attorney for the*
*Southern District of New York*
United States Court House
New York, New York

HAROLD I. BAYNTON
*Assistant Attorney General*
Department of Justice
155 Washington, D. C.

*Attorneys for Plaintiff*

MILBANK, TWEED, HOPE & HADLEY
*Attorneys for The Chase National Bank*
*of the City of New York*
15 Broad Street
New York 5, New York

FRUEAUFF, BURNS, RUCH & FARRELL
*Attorneys for Cities Service Company*
60 Wall Street
156 New York 5, New York

CLERK OF THE UNITED STATES DISTRICT COURT
Southern District of New York
United States Court House
Foley Square
New York, New York

## Stipulation as to Designation of Contents of Record on Appeal

157

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 55-262

[SAME TITLE]

IT IS HEREBY STIPULATED, AGREED and CONSENTED TO by and between the attorneys for the respective parties hereto that the following shall constitute the contents of the record on appeal herein: 158

1. Complaint of J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian, and Exhibits A to D, both inclusive, annexed thereto:

2. Answer of defendant, The Chase National Bank of the City of New York;

3. Answer of defendant, Cities Service Company;

4. Stipulation of counsel for the parties, dated May 25, 1950, and Exhibits 1 to 3, both inclusive, annexed thereto; 159

5. Notice of Motion of plaintiff for judgment on the pleadings or, in the alternative, for summary judgment;

6. Notice of Motion of defendant, The Chase National Bank of the City of New York, for judgment on the pleadings or, in the alternative, for summary judgment;

7. Notice of Motion of defendant, Cities Service Company, for judgment on the pleadings or, in the alternative, for summary judgment;

*Stipulation as to Designation of Contents of Record on Appeal*

160

8. Opinion of District Judge John F. X. McGohey, dated October 24, 1950;

9. Final Order and Judgment, dated November 6, 1950, and entered November 8, 1950;

10. Notice of Appeal of plaintiff with date of filing;

11. This Stipulation.

Dated: New York, N. Y., December 6, 1950.

161

IRVING H. SAYPOL,
*United States Attorney for the Southern District of New York, Attorney for Plaintiff,*
United States Court House,
New York, New York.

MILBANK, TWEED, HOPE & HADLEY,
*Attorneys for the Chase National Bank of the City of New York,*
15 Broad Street,
New York 5, New York.

162

FRUEAUFF, BURNS, RUCH & FARRELL,
*Attorneys for Cities Service Company,*
60 Wall Street,
New York 5, New York.

Filed Dec. 6, 1950

[fol. 55] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1950

No. 235

(Argued May 2, 1951. Decided June 13, 1951)

Docket No. 21925

J. HOWARD MCGRATH, Attorney-General, Appellant,

v.

CITIES SERVICE COMPANY and CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Appellees

Before Chase, Frank and L. Hand, Circuit Judges

Appeal from a judgment of the District Court for the Southern District of New York, summarily dismissing the complaint in an action by the Attorney-General, as Alien Property Custodian, upon three negotiable bonds, "vested" in him under the Trading with the Enemy Act.*

George B. Searls for the appellant.
William M. Evarts for the appellees.

[fol. 56] L. HAND, Circuit Judge:

This is an appeal from a judgment summarily dismissing the complaint of the Attorney-General as substituted owner of three negotiable bonds, payable to bearer, against the Cities Service Company, the obligor, and the Chase National Bank of New York, the "indenture trustee." The plaintiff claimed to have become the obligee of the bonds by virtue of a "vesting" order, issued by him as Alien Property Custodian under § 7 (c) and § 5 (b) of the Trading with the Enemy Act;* and the only issue is whether upon the conceded facts he is right. Of the original three bonds one had been paid before the "vesting order" was made, and of the remaining two, one has come into the hands of brokers in New York who are holding it for an American insurance company, and the whereabouts of the other is wholly unknown. At some undisclosed time a

* §§ 7 (c) and 5 (b), Title 50, War Appendix.

German citizen became the owner of all three bonds, from whom "the occupying authorities" of the "Russian Sector of Berlin" had seized them before March 11, 1949, the day of the "vesting order." Each party moved for summary judgment, and the judge held that the order did not "vest" the bonds in the plaintiff because, since bonds were outside the United States when "vested," they were as much beyond the power of the Alien Property Custodian as chattels situated in Germany. That is also the defendants' argument on this appeal: they say that the Act is limited to property within the United States and that as the actual instruments were not in this country, and were not mere evidences of the debt, but the very debt itself, they were not "within the United States," and subject to seizure. Further, they argue that, if we hold that the Act covered such debts, they will not be adequately protected from [fol. 57] future suits by possible bona fide holders, which place them in a position of very grave doubt constitutionally.

As to the defendants' first objection, we have no doubt that the Act applies to bonds issued by a citizen of the United States and held by an alien outside the country. That it meant to cover debts or obligations owed to aliens —including bonds—appears in several places. Thus § 7 (c) says that: "if the President shall so require, any money or other property including * * * choses in action, and rights and claims of every character and description owing or belonging to * * * an enemy * * * shall be * * * paid over to the Alien Property Custodian, or * * * may be seized" by him. Again, § 7 (e) declares that "in case of payment to the Alien Property Custodian of any debt or obligation owed to an enemy," he shall have power to execute a valid discharge and shall "deliver up any notes, bonds or other evidences of indebtedness or obligation * * * that may have come into" his "possession." Finally, § 9 (n) declares that: "in the case of property consisting * * * of bonded or other indebtedness, evidenced * * * by bonds * * * where the right, title and interest in the property (but not the actual * * * bond * * *) was conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian, or seized by him," the true owner may be indemnified, as provided in § 9 (b).

As we understand the defendants' objection it is further that, even though the intent of the Act was to make all

debts and choses in action, including bonds, subject to seizure, it was *brutum fulmen* as to bonds which are outside the United States at the time of "vesting," just as it is as to chattels so situated.* It is the bond, the document itself, which constitutes the debt, and whose location determines its "situs," regardless of the residence of the obligor [fol. 58] and the power over him of the state where that residence may be. It is true that for centuries it was the English law that sealed instruments of any kind—bonds among them—could not be sued on without "profert" of the original. The obligor was entitled to "crave oyer," and judgment for the obligee was conditional upon his compliance. It followed that, if the obligee lost the instrument, or if it were mutilated, he could not sue. Equity soon intervened and in 1804 Lord Elden was able to say: "The jurisdiction of this Court upon lost bonds is very ancient: founded upon a notion, acknowledged until a very late period, that there was no remedy at law upon a lost bond, as you could not make Profert." * The courts of law had already followed suit, though not until 1789; ** but equity still retained its jurisdiction; † and the equitable remedy certainly became a part of the general law of this country.†† Whether this archaic doctrine depended upon some mythical identification of the legal relation between the parties with the document is not important, even were we compelled to recognize it; the intervention of equity has dispelled it as a precedent, and in any event it is too patently a confusion of the legal rights and duties involved to constitute a bar to the constitutional powers of any state. Of itself a document—whether a deed, a bond, or any other sealed instrument—obviously is, and can be, nothing more than a piece of parchment or paper. Even though it were only when equipped with the document, that the obligee could invoke against the obligor the sanctions which the law provided, the obligation always consisted, and could only [fol. 59] consist of the power the law gave him to invoke

---

* *Frick* v. *Pennsylvania*, 268 U. S. 473.

* *East Indian Company* v. *Boddam*, 9 Ves. Jr. 464, 466.

** *Read* v. *Brookman*, 3 Term Rep. 151.

† *Atkinson* v. *Leonard*, 3 Brown's Ch. Cas. 218.

†† *Midkiff* v. *Cotton*, 252 Fed. Rep. 420 (C. C. A. 4); *Prescott* v. *Williamsport & N. B. R. Co.*, 159 Fed. Rep. 244.

those sanctions to coerce the obligor, and that was equally true even while possession of the document was a condition upon that power. Moreover, even if that had not been true, as soon as equity dispensed with that condition there remained no difference between a bond and any other "chose in action," which could affect the constitutional power of a state over the obligor. *Blackstone* v. *Miller*, 188 U. S. 189, 205, 206, remains, though after a somewhat checkered history,* the simplest statement of the situation: "What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case. * * * Power over the person of the debtor confers jurisdiction, we repeat." It is true that Holmes, *J.*, did then go on to distinguish "State Tax on Foreign Held Bonds," 15 Wall. 300, on the ground that bonds had there been involved, and that in such cases "the debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions," p. 206. We agree that that gives color to the defendants' position; yet with deference we read that language as no more than a way of avoiding a precedent which the court had decided to overrule. Furthermore, the distinction was altogether gratuitous, for in "State Tax on Foreign Held Bonds," *supra*, the court did not even intimate that it was a reason for the result; on the contrary it repeatedly spoke in language which would have held the tax invalid had it been imposed upon any kind of chose in action. The notion was that the "situs"—a word most destructive when [fol. 60] used in this connection—was the residence of the obligee. For the foregoing reasons we hold that the Act meant to authorize the seizure of the obligation "evidenced"—we use that word deliberately—by bonds outside the country, as well as any of other alien held choses in action; and that as an incident to his seizure the Alien Property Custodian may sue upon such a bond as surrogate of the holder. There remains the question whether the exercise of such a power raises any constitutional doubts, as the defendants insist.

---

* *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *State Tax Commission* v. *Aldrich*, 316 U. S. 174; *Standard Oil Co.* v. *New Jersey*, 341 U. S.

Their argument can be most forcibly stated as follows. Although the statute affects to discharge an obligor whom the Alien Property Custodian has compelled to pay the bond—§ 5 (b) (2) and § 7 (c)—and, although the statute may be a complete protection against suits brought later in any court of the United States by a bona fide holder of the bonds, it does not follow that it will be a good discharge in the court of a foreign state. Both defendants at bar are especially exposed to such suits: the Cities Service Corporation owns tankers that enter ports all over the world, and they will be constantly exposed to attachment or other proceedings *in rem;* the Chase Bank has a number of offices in Europe with assets similarly vulnerable; and it is to the last degree uncertain whether a foreign court, indeed any foreign court, will accept payment to the Alien Property Custodian as a valid discharge of the debt, and a defence to the suit. We recognize the force of this reasoning, and we shall assume for argument that, if it were true that the defendants remain exposed to such a recovery, and will have no consequent claim against the Treasury for recoupment, a judgment against them will "take" their property without compensation in violation of the Fifth Amendment. Upon that hypothesis the case therefore turns upon whether they will have such a claim, if they are later forced to pay a bona fide holder.

[fo. 61] We are satisfied that they will have. The Supreme Court in a long line of decisions which we cite in the margin has settled it that, when the United States "takes" property for a public purpose, an implied promise arises to pay compensation to the owner, even though no statute so provided.* All the conditions on which that doctrine depends will exist, if a bondholder succeeds in recovering

---

* *United States* v. *Great Falls M'f'g Co.*, 112 U. S. 645; *Great Falls M'f'g Co.* v. *Attorney General*, 124 U. S. 581; *United States* v. *Lynah*, 188 U. S. 445, 465; *Tempel* v. *United States*, 248 U. S. 121; *United States* v. *North American Co.*, 253 U. S. 330, 333; *Campbell* v. *United States*, 266 U. S. 368, 370, 371; *Phelps* v. *United States*, 274 U. S. 341, 343, 344; *International Paper Co.* v. *United States*, 282 U. S. 399, 407; *Hurley* v. *Kincaid*, 285 U. S. 95; *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 21; *United States* v. *Causby*, 328 U. S. 256.

from the defendants in a foreign court, after the plaintiff has recovered here. The obligor has of course consented to the "taking" of his property by the promisee; and to the sanctions that may be necessary to overcome his resistance. Moreover, in the case of a negotiable instrument, like the bonds at bar, the promisee is the holder; but the Alien Property Custodian by hypothesis is not the holder. When he compels the obligor to pay him, he "takes" the obligor's property in the constitutional sense; he totally deprives the obligor of what he collects, and he does so in execution of a public purpose of the United States. The obligor must be entitled to "just compensation" for his loss in one form or another, if that "taking" is to be valid. If the Act could give the obligor a discharge that protected him against any recovery by the promisee—the holder—that would be "just compensation"; and that is what the Act—§ 5 (b) (2) and § 7 (e)—does attempt to do and is effective to do in any court of the United States; but by hypothesis it may not be a discharge in a foreign court. To complete that "just compen-[fol. 62] sation" which in one form or another he must have, the obligor must acquire the power to recoup himself out of the Treasury. For these reasons it appears that all the conditions are realized on which the doctrine in question depends.

Indeed the question was really concluded by the decision of the Supreme Court in *Silesian-American Corporation* v. *Clark*, 332 U. S. 469, where the interest of certain Swiss banks was at stake, which were pledgees of shares of stock in a domestic corporation. The Alien Property Custodian had seized these shares because the owners, the pledgors, were enemy aliens; and he demanded that the corporation should issue shares to him in substitution for those seized. The corporation objected. It argued that, if the pledgees demanded recognition of their rights, the discharge granted it by the Act would not protect it; because, although the Act allowed the pledgees' interest to be seized, it gave them no recourse to the Treasury. Moreover, if the pledgees had no such recourse, their property could not lawfully be taken from them, from which it would follow that they could compel the corporation to issue shares to them as well as to the Alien Property Custodian. This was a sound argument because by the amendment of § 5(b) in 1941 the Alien Property Custodian got power to seize and sequestrate the property of a foreign alien who was not an enemy—§ 5(b)

(1)—yet § 9(a) gave relief only to a person who could "establish" an "interest" in the property, and in the case there at bar the interest of the foreign pledgees had been "vested" in the Alien Property Custodian. Moreover, since the property of friendly foreign nationals is protected by the Fifth Amendment, it followed that the seizure—the "taking"—was unconstitutional, unless they had a claim against the Treasury for their loss. In this indirect way it became evident that only in case the pledgees had such a claim was the claim of the Alien Property Custodian valid [fol. 63] against the corporation. The Supreme Court dealt with this aspect of the case in the following language: "The Constitution guarantees to friendly aliens the right to just compensation for the requisitioning of their property by the United States. *Russian Fleet* v. *United States, supra.* We must assume that the United States will meet its obligations under the Constitution. Consequently friendly aliens will be compensated for any property taken and Silesian is protected by the exculpatory clauses of the Act from any claim from its alien stockholders." * When the case was before us, we developed the same reasoning in a little more detail.** The contract in that case was "implied" in favor of the pledgees, while here it must be "implied" in favor of the defendants, but the principle is precisely the same; and indeed we rested our ruling upon those very decisions which we have cited more at length here.

There can be no doubt that the result we reach accords with the purpose of the Act and with the policy of the United States in both wars. To make it impossible for the Alien Property Custodian to reduce to possession debts or choses in action owed to aliens by our citizens would exempt a vast amount of enemy property, perhaps even the greater part that is within our reach. Without such an "implied contract" every obligor, certainly if he had business abroad, might with justice complain that the Act did not protect him, and it would be hard to find any answer to his claim that the Constitution protected him. Once it is decided that bonds stand in no different position from any

---

* *Silesian-American Corp.* v. *Clark, supra,* pp. 479, 480 (332 U. S. 469).

** *Silesian-American Corporation* v. *Markham,* 156 Fed. (2) 793, 797.

other chose in action, the result is plain. That they do not is equally plain.

Judgment reversed: summary judgment to be entered for the plaintiff on his motion.

---

[fol. 64] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of June one thousand nine hundred and fifty-one.

Present: Hon. Harrie B. Chase, Hon. Jerome N. Frank, Hon. Learned Hand, Circuit Judges.

J. HOWARD MCGRATH, Atterney General as Successor to Alien Property Custodian, Plaintiff-Appellant,

v.

CITIES SERVICE COMPANY, & ANO., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed; summary judgment to be entered for the plaintiff on his motion in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) Alexander M. Bell, Clerk.

[fol. 65] [Endorsed:] United States Court of Appeals, Second Circuit. J. Howard McGrath, Attorney General, v. Cities Service Company & ano. Judgment. United States Court of Appeals, Second Circuit. Filed June 13, 1951. Alexander M. Bell, Clerk.

---

[fol. 66] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 67] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 305

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 5, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 178, Uebersee Finanz-Korporation, A. G. vs. McGrath.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office-Supreme Court, U. S.
FILED
SEP 8 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951

No. 305

CITIES SERVICE COMPANY, AND THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, *Petitioners*

*v.*

J. HOWARD MCGRATH, *Attorney General*, as Successor to the Alien Property Custodian, *Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TIMOTHY N. PFEIFFER
THEODORE N. JOHNSEN
*Counsel for Petitioners*

MILBANK, TWEED, HOPE & HADLEY
*Attorneys for The Chase National Bank of the City of New York*

FRUEAUFF, BURNS, RUCH AND FARRELL
*Attorneys for Cities Service Company*

# INDEX


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Statute and Executive Orders Involved | 2 |
| Statement | 2 |
| Questions Presented | 5 |
| Reasons for Granting the Writ | 6 |
| Conclusion | 17 |


## List of Authorities

*Cases*


| | |
|---|---|
| Bank of Jasper *v.* First Nat. Bank, 258 U. S. 112 (1922) | 12 |
| Bozant *v.* Bank of New York, 156 F. 2d 787 (2d Cir. 1946) | 13 |
| Cherokee Nation *v.* Kansas R. Co., 135 U. S. 641 (1890) | 16 |
| Chicago, Burlington and Quincy Railroad *v.* Chicago, 166 U. S. 226 (1897) | 16 |
| Clark *v.* Uebersee Finanz-Korp., 332 U. S. 480 (1947) | 8, 9 |
| Clark-Wilcox Co. *v.* Northwest Engineering Co., 314 Mass. 402, 50 N. E. 2d 53 (1943) | 12 |
| Commissioner *v.* Kieselbach, 127 F. 2d 359 (3d Cir. 1942) | 16 |
| First Trust Co. of St. Paul *v.* Matheson, 187 Minn. 468, 246 N. W. 1 (1932) | 13 |
| Great Northern Railway *v.* Sutherland, 273 U. S. 182 (1927) | 15 |

PAGE

In re Manderson, 51 Fed. 501 (3d Cir. 1892) ..... 16

In re Rapoport's Estate, 317 Mich. 291, 26 N. W. 2d 777 (1947), cert. denied, 332 U. S. 764 ..... 13

McGrath *v.* Manufacturers Tr. Co., 338 U. S. 241 (1949) 15

Prescott *v.* Williamsport & N. B. R. Co., 159 Fed. 244 (C. C., E. D. Pa. 1908) ..... 13

Silesian-American Corp. *v.* Clark, 332 U. S. 469 (1947) 9, 10

State *v.* Barnett, 245 Mo. 99, 149 S. W. 311 (1912) ..... 12

Sweet *v.* Rechel, 159 U. S. 380 (1895) ..... 16

United States *v.* Causby, 328 U. S. 256 (1946) ..... 16

United States *v.* Lynah, 188 U. S. 445 (1903) ..... 16

United States *v.* Prince William County, 9 F. Supp. 249 (D. C. E. D. Va. 1934), aff'd, 79 F. 2d 1007, cert. denied, 297 U. S. 714 ..... 16

Von Hesse *v.* Mackaye, 55 Hun 365 (Sup. Ct. Gen. T. 1st Dep't 1890), aff'd, 121 N. Y. 694 ..... 12

Western Union Telegraph Co. *v.* Pennsylvania Railroad Co., 195 U. S. 540 (1904) ..... 16

Wheeler *v.* New York, 233 U. S. 434 (1914) ..... 13

STATUTES AND EXECUTIVE ORDERS

*Executive Orders:*

9095, 7 F. R. 1971, 3 C. F. R., 1943 Cum. Supp. 1121 .. 2

9193, 7 F. R. 5205, 3 C. F. R., 1943 Cum. Supp. 1174, as amended, 10 F. R. 6917 ..... 2, 4, 5, 6, 8, 11

Settlement of War Claims Act of 1928 (45 Stat. 272) .. 11

Trading with the Enemy Act, as amended (50 U. S. C. App. § 1 *et seq.*) ..... 2, 4, 5, 6, 7, 8, 9, 11

PAGE

§ 5(b) ..... 5, 11
§ 7(c) ..... 9
§ 9(a) ..... 8, 9
§ 9(n) ..... 11
§ 33 ..... 7
28 U. S. C. § 1254(1) ..... 2

*Miscellaneous*

Andrews, Situs of Intangibles in Suits against Non-resident Claimants, 49 Yale L. J. 241 (1939) ..... 12
Annotation, 71 A. L. R. 581 ..... 12
Beale, Conflict of Laws § 103.1 ..... 13
Daniel, Negotiable Instruments § 930 (7th ed. 1933) ..... 12
Drake, Attachment §§ 587, 588 ..... 12
General Ruling No. 5B (16 F. R. 539) ..... 7
H. R. Rep. No. 17, 70th Cong. 1st Sess. ..... 11
New York Times, Jan. 20, 1951 ..... 7
Pomeroy, Equity Jurisprudence § 832 (5th ed. 1941) 13
Press Release, Dept. of Justice, Jan. 19, 1951 ..... 7
Restatement, Conflict of Laws, § 52 ..... 13
Sen. Rep. No. 273, 70th Cong. 1st Sess. ..... 11
Treas. Reg. 105 § 81.50 ..... 13

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951

---

No.

---

CITIES SERVICE COMPANY, AND THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, *Petitioners*

*v.*

J. HOWARD MCGRATH, *Attorney General* as Successor to the Alien Property Custodian, *Respondent*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Cities Service Company and The Chase National Bank of the City of New York respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case.

### Opinions Below

The opinion of the United States District Court, Southern District of New York, is reported at 93 F. Supp. 408 (R. 43). The opinion of the United States Court of Appeals for the Second Circuit is reported at 189 F. 2d 744 (R. 55).

## Jurisdiction

The judgment of the Court of Appeals was entered June 13, 1951 (R. 62). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

## Statute and Executive Orders Involved

The statute here involved is the Trading with the Enemy Act, 50 U. S. C. App. §§ 1 *et seq.;* and the Executive Order is 9193, 7 F. R. 5205 (which amended Executive Order 9095), as amended, 10 F. R. 6917. Pertinent provisions are set forth in the appendix beginning at p. 19.

## Statement

By Vesting Order No. 12960, dated March 11, 1949, the Attorney General, as Successor to the Alien Property Custodian* purported to vest as property of a German national resident in Germany the "debt or other obligation" evidenced by, and "all rights in, to and under" three Cities Service Company negotiable bearer debentures (R. 8-10). Two of the bonds** were issued under an Indenture dated June 2, 1930, and one under an Indenture dated March 1, 1929 (R. 33-34). The Chase National Bank of the City of New York (hereinafter referred to as the Bank) is trustee and paying agent under both indentures.

The present action is one by the APC to compel, from the debtor and from the Bank, either the payment of, or the issuance of new bonds for, the three bonds asserted to have been vested. The bonds themselves are not in the possession of the APC (R. 5). In fact, the APC as-

---

* For convenience, the letters APC are used herein to designate whatever official was at the time administering the vesting program, together with the office under him.

** The instruments here were fully negotiable bearer debentures under seal (R. 34, 46, 56). Since for the present purposes there is no difference between a debenture and a bond under seal, the two terms are used interchangeably.

serted that the bonds were outside the United States (R. 14, 18, 56) and according to information given the APC they had been seized by the occupying authorities of the Russian sector of Berlin long before the purported vesting order (R. 32, 56).

One of the three bonds, with appurtenant coupons, had already been presented for payment at the Bank's offices in New York, and had been paid in usual course before the date of the Vesting Order (R. 32, 45, 55). The claim as to this bond has been dropped. Another of the three bonds was presented to the Bank in New York for payment on January 5, 1950 on behalf of Globe & Rutgers Fire Insurance Company—indisputably a non-enemy concern; was returned by the Bank unpaid because of the Vesting Order and is now apparently in the possession in New York of a New York brokerage firm (cf. R. 32-33, 45, 55).

The parties do not know where the third bond is (R. 33, 55). For the purposes of this case it must be assumed that it is physically outside the United States. The APC has made no effort to join the possessors of the bonds.

Neither of the governing indentures makes provision for the issuance of a new debenture to replace one already issued, except under the circumstances where the instrument has been mutilated, destroyed, lost or stolen, *and* provision made for adequate indemnity satisfactory to the debtor and the trustee against possible liability. Payment either of the debentures or of the coupons appertaining thereto is expressly conditioned, both in the debenture itself and in the governing indenture, upon presentation of the instruments. (See particularly Art. II, Sec. 9 of each indenture.) Under both indentures the debtor covenanted not to issue any debentures thereunder except in accordance with its provisions. (See Art. II, Sec. 6 of each indenture.)

The present action was instituted January 30, 1950 (R. 1). The District Court (McGohey, *D. J.*) granted petitioners' motions for summary judgment (R. 49). The court

held that, since in the case of a negotiable bearer bond the instrument embodies the property right, the vesting order was unauthorized in that it sought to vest property which was not "subject to the jurisdiction of the United States" or "within the United States" as required by the Trading With the Enemy Act and Executive Order 9193, as amended (R. 43).

The Court of Appeals reversed the judgment of the district court, and directed summary judgment for the APC (R. 63, 64). The court, apparently relying partly on the broad language of the Act as to debts and choses in action, and partly on the practical power of the United States over the debtor and the trustee present in the United States, held that the Act did apply to bonds of United States issue located abroad. The court did not discuss what Congress in the statute and the President in the Executive Order intended in imposing the limitations that the property be "subject to the jurisdiction of the United States" and "within the United States"; and indeed the court did not discuss the Executive Order at all. Recognizing the force of the argument that petitioners were under the threat of double liability because of possible judgments abroad, against which the Act's exculpatory provisions offered inadequate protection, the Court of Appeals reached the conclusion that any resulting taking of the petitioners' property would not be in violation of the Fifth Amendment, because an implied promise to compensate on the part of United States would then arise. It is not clear from the opinion of the court when it thought the "taking" of the obligors' property would occur or whose act would give to the obligors a present right to compensation. In some passages it would appear that the court thought that the adverse judgment of a foreign tribunal would, in some manner, amount to a "taking" *by the United States*; in other passages, it would appear that the court felt that the vesting by the APC constituted the "taking" but that such "taking" would not become complete and no obligation to compensate would arise until the entry of the foreign judgment. The court

did not specify any statutory provisions under which the debtor or trustee could proceed against the United States to recover compensation. Its opinion did not consider the other constitutional problem: i. e., whether the insufficiency of the statutory notice provided by the Act as to innocent non-enemy holders of the bonds, and the short statute of limitations for suits against the APC under the Act, if coupled with inability to obtain a remedy against the obligors, would deprive such bondholders of their constitutional rights under the Fifth Amendment.

## Questions Presented

1. Are the Trading with the Enemy Act, which requires that property to be vested be "subject to the jurisdiction of the United States", and Executive Order 9193, as amended, which requires that it be "within the United States", properly to be construed as authorizing the vesting of all rights under negotiable bearer bonds physically located outside the United States and never seized?*

2. Can the Act and Executive Order be construed as permitting, as an inevitable result of the vesting, the taking and retention of property of persons not determined to be "enemy nationals" or acting for "enemy nationals"?*

3. Can the APC, by a purported vesting without manucaption, change the obligation on a negotiable bearer bond so as to compel its reissue or payment without either surrender or provision for adequate indemnity?

---

* The APC's power to vest is only that given by the President in the Executive Order, since the Act merely authorized vesting upon the terms designated by the President (see § 5(b)). Therefore, if the Executive Order's authority is narrower than that of the Act, the terms of the Executive Order will control.

Only § 2(c) of the Executive Order can be here relied upon by the APC to support his vesting. His authority to vest under that section is confined to the situation where the property is that of an enemy national and is "within the United States."

4. As the Act provides expressly that the only relief for any person having any claim to any property transferred to the APC is the relief provided in the statute,* and as the Act fails to provide any remedy to a non-enemy citizen deprived of his property by the imposition of double liability, can a right to compensation for such a taking be implied? Is such an implied obligation to compensate—where the basis is so uncertain and the manner and time of enforcement are not provided for—sufficient to save the statute, as construed and applied in this case, from unconstitutionality under the Fifth Amendment?

5. If on the other hand the obligors are protected from double liability, will not the vesting of foreign-held bonds under these circumstances deprive innocent non-enemy holders of bonds of their property without notice or opportunity to be heard?

## Reasons for Granting the Writ

The court below has interpreted the Trading with the Enemy Act in such a way as to sustain the APC in the exercise of a power the existence of which, so far as can be determined, had never previously been urged before any court in the 34 years of the statute's existence. Whether or not this new extension comes as a result of a change in the administrative construction of the Act and Order, the fact that it comes so late is significant. The importance of this federal statute has increased rather than diminished since 1945, when it was thought the "shooting war" had stopped.

We urge that the court below was in error. Whether it was right or whether it was wrong, however, the importance of the decision, because of the effect on new administrative policies and on legal principles, is such as to call for this Court's present determination of the issues.

1. From the point of view of direct impact, it is apparent that others than the immediate parties and

* See § 7(c).

unknown holders of the bonds in issue are affected by the decision. Indeed, the precise issues of this case govern the validity of a large number of vesting orders of a like nature either recently issued or scheduled for issuance in the latter part of 1951 pursuant to the publicly announced program of the Department of Justice (see Press Release, Department of Justice, January 19, 1951; also New York Times, January 20, 1951, p. 22, cols. 2, 3), involving a vast number of foreign-held bonds of American issue, the location and present holders of which are unknown, including the several thousands of such bonds scheduled in the APC's General Ruling No. 5B (16 F. R. 539-545).

In view of the wide scope of the vesting program, the pace at which it is administered and the short statute of limitations (which commences with the effective date of a vesting order rather than with delivery of the property affected*), it is important that this Court pass on the APC's authority as soon as possible. Since difficult questions of possible liability to third persons are involved, and since the decision of the Court of Appeals is rested on views sharply in conflict with established principles (as will be outlined in more detail below), other obligors on bonds can hardly regard as conclusive this decision by an intermediate court. Time-consuming and expensive litigation both for the Government and for private parties may be avoided if this Court passes on the question now. Moreover, the instant case is ideal for the test. The facts are not in dispute; the record is simple and clear; and the issues are sharply drawn, without extraneous matters.

2. From a broader point of view, the decision below has far-reaching implications, both in its effect in impairing the negotiability of negotiable instruments (an impairment which will necessarily result in injury to many innocent purchasers) and in its unforeseeable effects on the concept of territorial limitations of sovereignty. It is petitioners' contention that the court below was wrong in

---

* Act, § 33; 8 C. F. R. § 504.1

attributing to Congress any intention either to impair negotiability or to depart from usual concepts of the extent to which the national power may justifiably be exercised. If the court below was wrong, then the possible ill effects in the area of international investment and trade are so important as to call for speedy correction. But even if this Court should hold the court below to have been right, it is still important that the pronouncement be made by this Court, so that Congress, private investors here and abroad (who may thereby be enabled to protect themselves against loss) and the foreign equivalents of the APC may be made aware of the controlling interpretation given the Act by the court of last resort.

3. Because of its construction of the statute as reaching property normally considered as located abroad, the court below, in order to avoid constitutional difficulties, found itself driven to strain construction of the statute in another direction. The court implied a right to compensation for those American obligors who might, through court decision abroad, be injured by the resulting imposition of double liability. The court recognized that in trying to reach enemy nationals' property in this situation, the APC might succeed only in taking instead the property of citizens who the APC never purported to find were "enemy nationals" within the scope of the Act and Order. Accordingly the court felt constrained to imply a right to compensation to those citizens so injured. The court, however, failed to reconcile this with the essential scheme of the Act and the Executive Order. Under that scheme, in the interest of speed under war-time conditions, the initial seizure of the property of citizens is permitted if the APC determines (mistakenly or otherwise) that the property is "enemy" owned; but the retention of property of any citizen or other person without enemy taint is not authorized, and in § 9(a) there is remedial provision for the return of any interest in seized property belonging to any such person.* That the framers of the act felt that no provision

* Clark v. Uebersee Finanz-Korp., 332 U.S. 480.

outside the Act was necessary for the protection of such persons is shown by § 7(c), which provides that "The sole relief and remedy of any person having any claim to any money or other property * * * paid over to the Alien Property Custodian, or required so to be * * * shall be that provided by the terms of this Act * * *." Neither § 9(a) nor any other part of the Act makes provision for compensation in instances where double liability may be imposed on obligors without enemy taint. Faced with the absence of statutory provision for compensation and with § 7(c), the court below did not attempt to specify any statutory basis for the right of compensation supposedly given to petitioners.

In departing from the statutory scheme thus apparently laid out by the Act, the court below cited as authority *Silesian-American Corp.* v. *Clark*, 332 U. S. 469 (1947). In so doing, we believe that the court below gave an interpretation to that case beyond what was sanctioned by this Court. In distinction to the opinion of the Court of Appeals for the Second Circuit in that case, the opinion of this Court, in spite of using the word "compensation" (332 U. S. at pp. 479-80), by no means makes it explicit that the remedy given the Swiss pledgees was anything other than the remedy under § 9(a). That section is readily susceptible of an interpretation that the pledgees' lien interest was an "interest [in the property] to which the court shall determine said claimant is entitled" under § 9(a). In *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480 (1947), decided the same day as the *Silesian-American* case, this Court removed doubts that might theretofore have existed as to the availability of § 9(a) to aliens without enemy taint. If the *Silesian-American* case decided no more than that the Swiss pledgees, who were not before the Court, might in a proper proceeding have a remedy under § 9(a), then that case is wholly inapplicable here, for neither the debtor nor the Bank has any "interest", in the normal meaning of the word, in the vested bonds here in issue. If the court below was wrong in its interpre-

tation of the *Silesian-American* decision, correction can come only from this Court, and should be speedy, since the importance for administration of the Act is unquestionably great. If, on the other hand, the *Silesian-American* case is susceptible of such application as the court below gave it, then we earnestly urge that its extension in this case—entailing as it does potential government liabilities not provided for by Congress in its plan for meeting obligations out of vested assets—is such as to call for reconsideration by this Court of the principle of that case.

4. The judgment in this case, if affirmed, will direct the debtor and the Bank to pay over certain amounts to the APC. In return they receive—besides the recognizably inadequate exculpatory provisions of the Act—only the statement of the court that should double liability result, the United States will doubtless make good. Petitioners of course do not quarrel with the prospect of compensation, but only with the fact that it appears so uncertain. The prospect is nebulous at best. If such a promise of compensation is to be regarded as adequate, however, despite the absence of direct statutory authority, then in all fairness the declaration should be that of the highest court, not that of a court with which other courts in this country are free to disagree.

5. Because the court below departed to such an extent from accepted views, the jarring impact of its decision is the greater. Though, as we have suggested, the need for this Court's passing on the case exists quite apart from any error in the decision below, we are—without any attempt to do more than suggest the argument on the merits—outlining some of the aspects in which that court departed from what we contend to be recognized principles:—

A. *The court below departed from the accepted principles as to jurisdiction over interests in negotiable instruments, and thereby altered the accepted meanings of the expressions "subject to the jurisdiction of the United States" and "within the United States" used in the Act and the Executive Order.*

The authority of the APC to vest is limited under § 5(b) of the Act to property "subject to the jurisdiction of the United States," and under the applicable Executive Order to property "within the United States."* The legislative history of the Act shows no intention on the part of Congress to depart from the accepted meaning of the language it used, nor is there any indication that the Executive Order attached any unusual significance to its phrase.**

A negotiable bond cannot be said to be subject to the jurisdiction of, or within, the United States if neither the instrument nor its holder is here. It has been a cardinal principal of the law of negotiable instruments, exemplified by decisions of this and other courts, that a state has no power to determine, or cut off, the rights of holders of nego-

---

* See footnote, p. 5.

** The court below believed that it found in § 9(n) of the Act (enacted—see 45 Stat. 272—as part of the Settlement of War Claims Act of 1928) indication of congressional intent that the vesting provision of § 5(b) should apply to bonds not in the possession of the APC. This evidence of intent is by no means conclusive. In the first place, the Act, in § 7(d), makes provision for voluntary payments or transfers to the APC, and § 9(n) refers to returns in such cases as well as in cases of vesting. Moreover, § 9(n) was a remedial provision relating to returns to purchasers or assignees of securities where there had been vesting or transfer without seizure: the fact that Congress subsequently felt impelled to give a remedy in that situation does not indicate Congressional approval of any previous vesting of negotiable bonds without seizure. Even more important, however, is the fact that § 9(n) need suggest no more than that non-negotiable bonds might have been so vested. The language of the Congressional Reports (Sen. Rep. No. 273, at p. 30, H. R. Rep. No. 17, at p. 21, 70th Cong. 1st Sess.) in stating the purpose of the measure suggests that stocks were primarily in mind, since the reference in each case is to the "certificate". The Reports similarly referred to "assignments", which is not a term associated with the negotiation of bonds.

tiable instruments where there is no jurisdiction over either the holders or the instruments.

*Bank of Jasper* v. *First Nat. Bank*, 258 U. S. 112, is directly in point. There this Court dealt with an effort, not unlike that of the APC in the case at bar, to have negotiable certificates of deposit in the hands of a non-resident holder declared void, and to have the obligation represented by the certificates declared to be payable to the claimants. Distinguishing the situation from that where the "indebtedness, if it had rested in open account, would have been the property of the creditor within the State of Florida," the Court, in an opinion by Mr. Justice Brandeis, held that the judgment granting the relief sought was void for want of jurisdiction:

> "Like other notes they are negotiable and are payable only upon surrender of the instrument properly endorsed. * * * As neither the certificates of deposit nor the holder thereof were within the State of Florida, its courts could not—in the absence of consent—acquire jurisdiction to determine the liability of maker to holder." (258 U. S. at p. 119)

This is the rule in New York, where the bonds are payable, and elsewhere. *Von Hesse* v. *Mackaye*, 55 Hun 365, *aff'd on opinion below*, 121 N. Y. 694; and see cases discussed in 2 Daniel, *Negotiable Instruments* § 930 (7th ed. 1933), Drake, *Attachment* §§ 587, 588, Annotation, 71 A. L. R. 581, and Andrews, *Situs of Intangibles in Suits against Nonresident Claimants*, 49 Yale L. J. 241, 244, where, after reviewing the authorities, the author found it "safe to conclude that the situs of the bonds themselves is the only situs for the jurisdiction *in rem* over obligations evidenced by bonds."

Whether the reason assigned be that the property is embodied in the bonds and is therefore not within the jurisdiction (e. g., *State* v. *Barnett*, 245 Mo. 99, 149 S. W. 311) or that it is impossible either effectively to enjoin negotiation of the instruments or to notify bona fide purchasers so as to protect the obligors (e. g., *Clark-Wilcox Co.* v.

*Northwest Engineering Co.*, 314 Mass. 402, 50 N. E. 2d 53), there has emerged from the cases the principle summed up in 1 Beale, *The Conflict of Laws* § 103.1: "A bond is always regarded as situated where it is found, and action to reach and deal with bonds may therefore be brought in the state where the bonds are found; and on the other hand an action of the sort cannot be brought where neither the bonds nor the owner of them are within the state * * *." See also Restatement, *Conflict of Laws*, § 52.

This rule is but expressive of the view, obtaining throughout the commercial world, which regards bonds as embodying the property they represent. The court below appeared to regard this view as nothing but a survival of archaic notions.* However, as Mr. Justice Holmes said for the Court in *Wheeler* v. *New York*, 233 U. S. 434, 439, "It is not primitive tradition alone that gives their peculiarities to bonds, but a tradition laid hold of, modified and adapted to the convenience and understanding of business men." Cf. *In re Rapoport's Estate*, 317 Mich. 291, *cert. denied*, 332 U. S. 764; *First Trust Co. of St. Paul* v. *Matheson*, 187 Minn. 468, 246 N. W. 1; U. S. Treas. Reg. 105 § 81.50; and see *Bozant* v. *Bank of New York*, 156 F. 2d 787, 790 (2d Cir. 1946).

The error of the court below and the soundness of the generally recognized view is shown by the very opinion of the court below, which had to admit the ineffectiveness of the action of the APC to reach the rights of the holder and transfer them to himself. The opinion states that "in the case of a negotiable instrument, like the bonds at bar, the promisee is the holder; but the Alien Property Cus-

---

* The court below (R. 58-59) also regarded this view as overcome by the development of the rule that equity will enforce recovery on a bond which is lost, stolen or mutilated. However, the price exacted by equity is protection of the obligor by suitable indemnity bond. See, *e. g.*, Prescott *v.* Williamsport & N. B. R. Co., 159 Fed. 244. Indeed, equity jurisdiction of actions on missing negotiable bonds arose originally from the fact that courts of law could not require the necessary indemnity. 3 Pomeroy, *Equity Jurisprudence* § 832 (5th ed. 1941). In this case the APC has not offered to furnish any indemnity bond.

todian by hypothesis is not the holder" (R. 60). This is merely a recognition of the hard fact that the United States through the exercise of its power has not vested the bonds or "obligations"; the effect of the Vesting Order, if sustained, is only to compel the payment of a sum of money to the APC without destroying the obligation of the debtor to the holder of the instrument. As the court below phrased this: "When [the APC] compels the obligor to pay him, he 'takes' the obligor's property in the constitutional sense; he totally deprives the obligor of what he collects * * *." (R. 60.)

The generally recognized view which regards bonds as embodying the property they represent, is based upon the practicalities of a long history of finance and trade which emphasizes the importance of free transfer of negotiable instruments from hand to hand, without the necessity that a purchaser in good faith go beyond the instrument itself in seeking to ascertain his rights. It was in the framework of this view that Congress enacted the Act, which, like other Federal statutes, perforce assumed the existence of, and sought application to, property rights and obligations as created and recognized by existing law.

B. *The court below departed from the accepted view that a vesting order cannot alter the nature of the obligation vested.*

The obligations of Cities Service and the duties of the Bank, as trustee, are governed by the provisions of the debentures and the related indentures. Neither indenture makes any provision for the issuance of a new debenture to replace one already issued except under the circumstances where the instrument has been mutilated, destroyed, lost or stolen and provision has been made for adequate indemnity, satisfactory to the debtor and the trustee, against possible double liability. The obligation for payment either of the debentures or of the coupons appertaining thereto is conditioned upon presentation of the instruments for cancellation. Whatever the obligation purportedly vested by the vesting order, there was

in fact and law no obligation on the part of Cities Service or the Bank to pay principal and interest of the debentures or to issue new debentures otherwise than in accordance with the terms thereof and provisions of the indentures. As this Court has recently suggested in *McGrath* v. *Manufacturers Tr. Co.*, 338 U. S. 241, 249-251 (1949), the APC cannot vest a non-existent obligation nor call it into being by declaring it to exist. It would seem to follow therefore that the APC cannot create an obligation different from one actually existing and then hold the supposed obligor to the terms of the APC's creation.

The mere removal of certain requirements as to methods of proving ownership (*cf. Gt. Northern Ry.* v. *Sutherland*, 273 U. S. 182 (1927)) is readily distinguishable from an attempted alteration of the obligations of a debtor and the duties of a trustee.

*C. The court below departed from accepted principles of constitutional law in treating a promise to compensate which that court implied, as adequate to save the constitutionality of a statute which as construed by that court sanctions a taking of private property without express provision for ascertainment and payment of compensation.*

The decision below rests upon what appears to be a novel theory of constitutional law. Ignoring the difficulty in reconciling the statutory scheme of the Act with the existence of an implied promise to compensate for any "taking" of property as a result of double liability, the Court of Appeals adopted a deceptively simple line of reasoning. From the premise that an uncompensated taking imposes on the Government an implied obligation to pay compensation, it proceeds to the conclusion that, therefore, a court may lend its powers to assist in a taking pursuant to a statute which does not provide for compensation. It would follow that no taking could be unconstitutional since, it would seem, the mere threat of unconstitutionality would suffice to give rise to the saving right of compensation. Such a view conflicts with the

well recognized rule that whenever private property is taken for public use "it is a condition precedent to the exercise of such power that the statute make provision for reasonable compensation to the owner." *Sweet* v. *Rechel*, 159 U. S. 380, 399. See also *In re Manderson*, 51 Fed. 501 (C. A. 3d); *Chicago, Burlington and Quincy Railroad Co.* v. *Chicago*, 166 U. S. 226, 238; *Western Union Telegraph Co.* v. *Pennsylvania Railroad Co.*, 195 U. S. 540, 567-568, 570; *Commissioner* v. *Kieselbach*, 127 F. 2d 359, 363 (C. A. 3d); *United States* v. *Prince William County*, 9 F. Supp. 219, 221 (D. C. E. D. Va.), *aff'd on opinion below*, 79 F. 2d 1007 (C. A. 4th), *cert. denied*, 297 U. S. 714.

The cases cited by the court below in support of the principle that an implied promise to pay compensation arises when the Government takes private property for public use, have to do, not with judicial enforcement of Governmental demands to deliver property, but with rights created in dispossessed owners by exercise of the Governmental powers, as e. g., the flooding of fast lands in the course of constructing a dam, *United States* v. *Lynah* 188 U. S. 455, or the imposition of a servitude on land by appropriating the air above it by regular, low-level airplane flights. *United States* v. *Causby*, 328 U. S. 256. But where the Government invokes the aid of a court to put it in possession of property it seeks to take, it seems clear that there must be reliance upon the terms of a statute which affords to the owner "reasonable, certain and adequate provision for obtaining compensation" (*Cherokee Nation* v. *Kansas R. Co.*, 135 U. S. 641, at p. 659). As the cases above cited demonstrate, no statute can afford such reasonable, certain and adequate provision unless it recognizes the right of the owner to just compensation, and makes provision for the prompt determination and payment of such compensation from the public funds.

## CONCLUSION

**It is respectfully submitted that this petition for a writ of certiorari should be granted.**

TIMOTHY N. PFEIFFER

THEODORE N. JOHNSEN
*Counsel for Petitioners*

MILBANK, TWEED, HOPE & HADLEY
*Attorneys for The Chase National Bank of the City of New York*

FRUEAUFF, BURNS, RUCH AND FARRELL
*Attorneys for Cities Service Company*

September, 1951

# APPENDIX

## Statute

TRADING WITH THE ENEMY ACT, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. § 1 *et seq.*

* * * * *

Sec. 5.

* * * * *

(b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit

of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

* * * * *

Sec. 7.

* * * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality

of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of

enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * * *

Sec. 9. (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution

of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

## Executive Order

EXECUTIVE ORDER No. 9193, July 6, 1942, 7 Fed. Reg. 5205, as amended, Exec. Order 9567, June 8, 1945, 10 F. R. 6917; 3 C. F. R., 1943 Cum. Supp. 1174.

* * * * *

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in

the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

* * * * *

(c) any other property or interest within the United States of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, a designated enemy country or national thereof * * *.

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U. S.
FILED
OCT 19 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951

No. 305

CITIES SERVICE COMPANY, and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

*Petitioners,*

*v.*

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY BRIEF FOR PETITIONERS

Since the filing of the petition for certiorari herein, action has been taken by the Attorney General which emphasizes and increases the importance of this case, as one presenting issues likely to be crucial in thousands of other instances.

The widened vesting program referred to in the Petition (p. 7) as prospective has now been put into effect. By Vesting Orders dated September 27, filed October 2, 1951 (Vesting Orders Nos. 18521, 18519 and 18520; 16 F. R. 10097-10102), some thousands of bonds of various domestic issues, whose total value runs into millions, have

purportedly been vested. The circumstances are such as to make it clear that the instruments have not been seized or come into possession of the APC, for the vesting is of securities scheduled by General Ruling 5B (16 F. R. 539) which have not been deposited with the Federal Reserve Bank as required by the terms of that Ruling. See the Press Release of the Department of Justice, October 4, 1951, G. P. O. 85-50072; cf. N. Y. Times, Oct. 6, 1951, p. 24, col. 2. In the case of Vesting Order 18519, the bonds are purportedly vested as property of unknown persons, as to whom the Vesting Order found that there was "reasonable cause to believe" that they were residents of enemy countries and hence enemy nationals. In the case of Vesting Orders 18520 and 18521, the bonds are purportedly vested as property of unspecified Netherlands nationals. In view of these circumstances, along with the requirements of General Ruling 5B as to deposit, it is to be inferred that many, if not most, of the instruments are also physically located outside the United States. The determination of the issues present in the instant case has therefore become of fresh importance to great numbers of individuals and institutions directly affected by these new vesting orders.

The Department of Justice Press Release states that, as a result of this purported vesting of securities, "the rights of holders of such securities have been nullified." (Compare the specious effort to distinguish *Bank of Jasper* v. *First National Bank*, 258 U. S. 112, in Respondent's Brief in Opposition, n. 6, p. 10, where Respondent seems to argue that the enforcement of such a vesting order does not involve a determination of the liability of obligors to holders, although the holders are deprived of their rights against the obligors.) In the face of the APC's claim that such sweeping consequences follow vesting, and in the light of existing law (see the Petition, pp. 11-16), the problem of obligors as to whether the vesting orders of this type are within the power of the APC is inescapably serious. The Petition gave a number of reasons why it is believed important for this Court to review the decision below—regardless

of how the case is ultimately determined. Those reasons the Respondent made no effort to counter, but only urged that on the merits the court below was right. Because these reasons are all the more pressing as a result of the vast amount of securities involved in the new vestings, we urge again that the petition for the writ of certiorari be granted.

Respectfully submitted,

TIMOTHY N. PFEIFFER,

THEODORE N. JOHNSEN,
*Counsel for Petitioners.*

MILBANK, TWEED, HOPE & HADLEY,
*Attorneys for The Chase National Bank of the City of New York:*

FRUEAUFF, BURNS, RUCH and FARRELL,
*Attorneys for Cities Service Company.*

October 18, 1951

Office-Supreme Court, U. S.
FILED
DEC 11 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951

No. 305

CITIES SERVICE COMPANY and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

*Petitioners,*

*v.*

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR THE PETITIONERS

TIMOTHY N. PFEIFFER,
*Counsel for Petitioner,*
*The Chase National Bank of the City of New York.*

ROY C. HABERKERN, JR.,
REBECCA M. CUTLER,
RALPH C. MURRAY,
*of Counsel.*

THEODORE N. JOHNSEN,
*Counsel for Petitioner,*
*Cities Service Company.*

# INDEX


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Statute and Executive Orders Involved | 2 |
| Questions Presented | 2 |
| Statement | 3 |
| Errors Urged | 7 |
| Summary of Argument | 8 |
| POINT I—Negotiable bearer bonds are not subject to the jurisdiction of, or within, a country when neither the instruments nor the holders are there. Since the bonds here involved were therefore neither subject to the jurisdiction of the United States nor within the United States, their vesting was not authorized by the terms of the applicable Executive Order or by the terms of the Trading with the Enemy Act | 9 |
| Basic Limitations of the Act and Executive Order | 13 |
| Jurisdiction over, and Location of, Debts Embodied in Negotiable Bearer Instruments | 15 |
| Congressional Intent | 21 |
| Court Decisions under the Trading with the Enemy Act | 26 |
| POINT II—The APC has no power either under the Act or the Order to vest property of Cities Service Company or the Bank, neither of which has been determined to be an enemy; nor has the APC power to accomplish what the complaint here seeks, namely the alteration of the obligations of the obligors, and the vesting of the non-existent obligations thus created | 29 |

PAGE

POINT III—To apply the statute as the APC contends it should be applied would raise serious constitutional questions ..... 32

The Constitutional Difficulties ..... 32

The Ineffectiveness of an "Implied" Right to Compensation by the United States to Avoid the Constitutional Questions ..... 40

POINT IV—No policy of the United States declared by Congress would be frustrated by denying validity to the Vesting Order here involved ..... 46

APPENDIX ..... 53

Statute ..... 53

Executive Order ..... 58

# LIST OF AUTHORITIES CITED

PAGE

CASES

American Banana Co. *v.* United Fruit Co., 213 U. S. 347 (1909) ..... 14

Anderson National Bank *v.* Luckett, 321 U. S. 233 (1944) ..... 33, 35

Baltimore and Ohio Railway Co. *v.* Sutherland, 18 F. 2d 560 (4th Cir. 1927) ..... 28n

Bank of Jasper *v.* First National Bank, 258 U. S. 112 (1922) ..... 15-16, 17n

Bickel & Cie. *v.* Schürch, 62 II BGE* 108 (Swiss Federal Tribunal 1936) ..... 37n

Bozant *v.* Bank of New York, 156 F. 2d 787 (2d Cir. 1946) ..... 19n

Central Trust Co. *v.* Garvan, 254 U. S. 554 (1921) ..... 27, 30, 34

Cherokee Nation *v.* Kansas R. Co., 135 U. S. 641 (1890) ..... 46

Chicago, Burlington and Quincy Railroad Co. *v.* Chicago, 166 U. S. 226 (1897) ..... 46

Chicago, Milwaukee and St. Paul R. R. *v.* Wisconsin, 238 U. S. 491 (1915) ..... 46

Clark *v.* Uebersee Finanz-Korp., 332 U. S. 480 (1947) ..... 13, 33, 49n

Clark-Wilcox Co. *v.* Northwest Engineering Co., 314 Mass. 402, 50 N. E. 2d 53 (1943) ..... 17

Columbia Brewing Co. *v.* Miller, 281 Fed. 289 (5th Cir. 1922) ..... 28n

Commercial Trust Company *v.* Miller, 262 U. S. 51 (1923) ..... 27

Connecticut Insurance Co. *v.* Moore, 333 U. S. 541 (1948) ..... 35

Crozier *v.* Krupp, 224 U. S. 290 (1912) ..... 44n

* Entscheidungen des schweizerischen Bundesgerichtes—Amtliche Sammlung (Arrêts du Tribunal Fédéral Suisse—Recueil Officiel).

PAGE

Delaware, Lackawanna and Western Railroad Co. *v.* Morristown, 276 U. S. 182 (1928) ..... 44, 45n

East India Company *v.* Boddam, 9 Ves. Jr. 464 (1804) 20

Edwards *v.* Bates County, 163 U. S. 269 (1896) ..... 21n

First Trust Co. of St. Paul *v.* Matheson, 187 Minn. 468, 246 N. W. 1 (1932) ..... 17

Foley Bros. *v.* Filardo, 336 U. S. 281, 287 (1949) ..... 14

Great Northern Railway *v.* Sutherland, 273 U. S. 182 (1927) ..... 28, 28n, 32, 34

Guigue, Déchandon, Anclair et Cie. *v.* Stromeyer, 40 BGE 483 (Swiss Federal Tribunal 1914) ..... 37n

Hooe *v.* United States, 218 U. S. 322 (1910) ..... 44

Hurley *v.* Kincaid, 285 U. S. 95 (1932) ..... 45n

In re Manderson, 51 Fed. 501 (3d Cir. 1892) ..... 46

In re Rapoport's Estate, 317 Mich. 291, 26 N. W. 2d 777 (1947); cert. denied, 332 U. S. 764-5 ..... 17

Ingenohl *v.* Olsen & Co., 273 U. S. 541 (1927) ..... 39-40

Jellenik *v.* Huron Copper Mining Co., 177 U. S. 1 (1900) ..... 28

Long Island L. & T. Co. *v.* L. I. C. & N. R. R. Co., 85 App. Div. 36 (2d Dept. 1903), *aff'd.*, 178 N. Y. 588 (1904) ..... 21n

McGrath *v.* Manufacturers Trust Co., 338 U. S. 241 (1949) ..... 31,

Miller *v.* Kaliwerke Achersleben Aktien-Gesellschaft, 283 Fed. 746 (2d Cir. 1922) ..... 28, 28n

Mullane *v.* Central Hanover Trust Co., 339 U. S. 306 (1950) ..... 35

Nathan-Institut A. G. *v.* Schweizerische Bank für Kapitalanlagen, 60 II BGE 294 (Swiss Federal Tribunal 1934) ..... 37n

PAGE

Panama R. R. Co. *v.* Johnson, 264 U. S. 375 (1924) ... 32
Pennoyer *v.* Neff, 95 U. S. 714 (1877) ... 34
Prescott *v.* Williamsport & NBR Co., 159 Fed. 244 (CC, ED Pa. 1908) ... 20
Presidio County *v.* Noel-Young Bond Co., 212 U. S. 58 (1909) ... 21n
Propper *v.* Clark, 337 U. S. 472 (1949) ... 25n
Railroad Co. *v.* Collector, 100 U. S. 595 (1879) ... 38-39
Rheinische Grundstücks-Handelsgesellschaft m.b.h. *v.* A.-G. für Immobilienwerte, 61 II BGE 242 (Swiss Federal Tribunal 1935) ... 37n
Silesian-American Corp. *v.* Clark, 332 U. S. 469 (1947) ... 33, 43-44, 48
Standard Oil Co. *v.* New Jersey, 341 U. S. 428 (1951) 35
State *v.* Standard Oil Co., 5 N. J. 281, 74 A. 2d 565 (1950), aff'd, 341 U. S. 428 (1951) ... 31-2
State Tax Commission *v.* Aldrich, 316 U. S. 174 (1942) 20
Sweet *v.* Rechel, 159 U. S. 380 (1895) ... 46
United States *v.* C. I. O., 335 U. S. 106 (1948) ... 32
United States *v.* Erie Railway Co., 106 U. S. 327 (1882) 38
United States *v.* Goltra, 312 U. S. 203 (1941) ... 44
United States *v.* Guaranty Trust Co., 293 U. S. 340 (1934) ... 18
United States *v.* Jin Fuey Moy, 241 U. S. 394 (1916) 32
United States *v.* North American Co., 253 U. S. 330 (1920) ... 45
Von Hesse *v.* Mackaye, 55 Hun 365 (Sup. Ct. Gen. T. 1st Dep't 1890), aff'd, 121 N. Y. 694 ... 16
W. S. Bank *v.* Town of Solon, 136 N. Y. 465 (1893) ... 21n
Weissman *v.* Banque de Bruxelles, 254 N. Y. 488 (1930) 18
Western Union Telegraph Co. *v.* Pennsylvania R. R., 195 U. S. 540 (1904) ... 44, 46
Wheeler *v.* New York, 233 U. S. 434 (1914) ... 19

PAGE

CONSTITUTION, STATUTES AND EXECUTIVE ORDERS

Executive Orders:

8389, 3 C. F. R. 1943 Cum. Supp. 645 ..... 24
8389 as amended, 31 C. F. R., 1949 Ed., §§ 127.9-127.17 ..... 24n
9095, 7 Fed. Reg. 1971 ..... 2
9193, 7 Fed. Reg. 5205, 3 C. F. R. 1943 Cum. Supp. 1174 (see also Executive Order 9567 below); 50 U. S. C. A. App. (1951), p. 43 ..... 2, 6, 7, 8, 9, 10, 11, 14, 24n, 26, 30, 58
9567, 10 Fed. Reg. 6917 ..... 2
9760, 11 Fed. Reg. 7999 ..... 2n
9788, 11 Fed. Reg. 11981 ..... 2n
Joint Resolution (Public Law 181, 82nd Cong., 1st Sess., 65 Stat. 451) ..... 47n
New York Negotiable Instruments Law § 96 ..... 37
New York Civil Practice Act §§ 916, 917 ..... 17
Trading with the Enemy Act, as amended; 50 U. S. C. App. (1946 Ed. and Supp. IV) §§ 1 *et seq.* ..... 2, 6, 7, 8, 9, 10, 11, 12, 13-14, 21-26, 30, 33, 34, 35, 36, 40, 41, 42, 43, 44, 46, 47-48, 53-58
§ 5(b) as amended by Joint Resolution of May 7, 1940, 54 Stat. 179 ..... 24, 25
§ 5(b) as amended by First War Powers Act of 1941, 55 Stat. 839-840 ..... 13, 25
§ 7(c) as amended in 1918, 40 Stat. 1020-1 ..... 22, 27, 28
§ 9(n) as enacted by Settlement of War Claims Act, 45 Stat. 272-3 ..... 23
§ 39 as added in 1948, 62 Stat. 1246 ..... 48
Uniform Negotiable Instruments Law, 5 U. L. A. § 57 ..... 16, 37
United States Constitution, Amendment V ..... 3, 6, 7, 8, 32-46
26 U. S. C. §§ 860-863 (Internal Revenue Code) ..... 18

PAGE

28 U. S. C. § 1254(1) ..... 2
§ 1346 ..... 41
§ 1491 ..... 41

---

MISCELLANEOUS

Alk and Moskovitz, Removal of United States Controls over Foreign-Owned Property, 10 Fed. B. J. 3 (1948) ..... 48n
Andrews, Situs of Intangibles in Suits Against Nonresident Claimants, 49 Yale L. J. 241 (1939) ..... 17
Beale, Conflict of Laws § 103.1 ..... 19
Bishop, Judicial Construction of the Trading with the Enemy Act, 62 Harv. L. Rev. 721 (1949) ..... 25n, 30, 48n, 50
Daniel, Negotiable Instruments, Vol. 2, § 930 (7th ed. 1933) ..... 17
Drake, Attachment §§ 587, 588 ..... 17
Freutel, Exchange Control, Freezing Orders and the Conflict of Laws, 56 Harv. L. Rev. 30 (1942) ..... 37n, 38, 48n
Guggenheim, Die Schweiz, das alte und das neue Völkerrecht, 26 Schweitzer Monat Hefte 321 (No. 6, Sept. 1946) ..... 38n
Nussbaum, Deutsches Internationales Privatrecht (1932) 37n
Pomeroy, Equity Jurisprudence, Vol. 3, §§ 831, 832 (5th ed. 1941) ..... 20
Rabel, Situs Problems in Enemy Property Measures, 11 Law & Contemp. Prob. 118 (1945) ..... 38
Reeves, Control of Foreign Funds, 11 Law & Contemp. Prob. 17 (1945) ..... 48n
Restatement, Conflict of Laws § 52; § 62 ..... 19
Schnitzer, I Handbuch des Internationalen Privatrechts (3d ed. Basel 1950), p. 220 ..... 38

PAGE

Wolff, Private International Law (London 1950), p. 473 ..... 38, 38n
New York Times, 1946, Apr. 8, p. 4, col. 5, Apr. 13, p. 11, col. 4, Apr. 29, p. 4, col. 5 ..... 38n
Note, 41 Col. L. Rev. 1039, 1042-4 (1941) ..... 48n
Annotation, 71 A. L. R. 581 ..... 17
H. R. Rep. No. 17, 70th Cong., 1st Sess. ..... 23
H. R. Rep. No. 1507, 77th Cong., 1st Sess. (1941 U. S. Code Cong. Service, p. 1029) ..... 48
Sen. Rep. No. 273, 70th Cong., 1st Sess. ..... 23
Sen. Rep. No. 1496, 76th Cong., 3d Sess. ..... 24, 25
56 Cong. Rec. 11430-1, 11481-2 ..... 22
86 Cong. Rec. 5006-8, 5169, 5171, 5172, 5175-5180 ..... 24-5, 48
87 Cong. Rec. 9838, 9845, 9862, 9865-6 ..... 25, 48
Letter of Secretary Snyder, as Chairman of the National Advisory Council, to Senator Vanderberg, February 2, 1948 ..... 49
Letter from the French Minister of Finance to the Secretary of the Treasury, dated September 26, 1945, attached to Treasury's Press Release V-75 ..... 49
General Ruling 2 (86 Cong. Rec. 5171) ..... 25

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951

---

No. 305

---

CITIES SERVICE COMPANY and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

*Petitioners,*

*v.*

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## BRIEF FOR THE PETITIONERS

### Opinions Below

The opinion of the United States District Court, Southern District of New York, is reported at 93 F. Supp. 408 (R. 43-48). The opinion of the United States Court of Appeals for the Second Circuit is reported at 189 F. 2d 744 (R. 55-62).

### Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered June 13, 1951. The petition for a writ of certiorari was filed September 8, 1951 and was granted

November 5, 1951. The jurisdiction of this Court rests on 28 U. S. C. § 1254 (1).

## Statute and Executive Orders Involved

The statute here involved is the Trading with the Enemy Act, 50 U. S. C. App. §§ 1 et seq.; and the Executive Order is 9193, 7 F. R. 5205 (which amended Executive Order 9095) as amended, 10 F. R. 6917*; 50 U. S. C. A. App. (1951) p. 43. Pertinent provisions are set forth in the appendix, pp. 53-58.

## Questions Presented

1. Are the Trading with the Enemy Act, which requires that property to be vested be "subject to the jurisdiction of the United States", and Executive Order 9193, as amended, which requires that it be "within the United States", properly to be construed as authorizing the vesting of all rights under negotiable bearer bonds physically located outside the United States and never seized?

2. Can the Act and Executive Order be construed as permitting, as an inevitable result of the vesting, the taking and retention of property of persons not determined to be "enemy nationals" or acting for "enemy nationals"?

3. Can the APC, by a purported vesting without manucaption, change the obligation on a negotiable bearer bond so as to compel its reissue or payment without either surrender or provision for adequate indemnity?

4. As the Act provides expressly that the only relief for any person having any claim to any property transferred to the APC is the relief provided in the statute, and as the Act fails to provide any remedy to a non-enemy

* Executive Order 9760, 11 F. R. 7999, and Executive Order 9788, 11 F. R. 11981, did not affect Executive Order 9193 in a way pertinent to the issues here.

citizen deprived of his property by the imposition of double liability, can a right to compensation for such a taking be implied? Is such an implied obligation to compensate—where the basis is so uncertain and the manner and time of enforcement are not provided for—sufficient to save the statute, as construed and applied in this case, from unconstitutionality under the Fifth Amendment?

5. If on the other hand the obligors are protected from double liability, will not the vesting of foreign-held bonds under these circumstances deprive innocent non-enemy holders of bonds of their property without notice or opportunity to be heard?

## Statement

The present action was brought by the Attorney General, as successor to the Alien Property Custodian,* to compel, from the debtor (Cities Service Company) and the "indenture trustee" (the Chase National Bank), either the payment of, or the issuance of new bonds for, certain bonds which were purportedly vested as property of a German national resident in Germany. (Complaint and Vesting Order annexed, R. 3-10.) The instruments were not surrendered or offered to be surrendered; the complaint alleged that they were not obtainable by the APC (R. 5). No holder was joined as a party (R. 1).

The instruments in question were fully negotiable bearer debentures** under seal (R. 33-34, 55; see also the

---

* For convenience and simplicity, the letters APC are used hereinafter to designate whatever official was at the time administering the vesting program, together with the office under him.

** The instruments were debentures, but they are referred to in the vesting order as bonds; and since for present purposes there is no difference between a debenture and a bond, the two terms are here used interchangeably.

Indentures,* at pp. 1, 7 of the 1930 Indenture and pp. 1, 5 of 1929 Indenture). According to the APC, they were outside the United States when he directed the turnover of the property (R. 14).

The Vesting Order, No. 12960, dated March 11, 1949, purported to vest the "debt or other obligation" evidenced by, and "all rights in, to and under", three bonds (R. 8-9). There was no mention of coupons. On March 28, 1949, Cities Service Company was directed by the APC to note the APC's ownership on its books (R. 11-12); and on June 17, 1949 was told to "cancel" two bonds which had been called, and to pay over the proceeds of redemption together with interest represented by unpaid coupons, and to "cancel" the third bond and issue a new bond with any unpaid coupons attached, or at the option of Cities Service to pay the amount thereof (R. 13-16). No demand prior to suit is alleged to have been made on the Bank.

At the time when the turnover of the property was called for, the APC informed Cities Service that the bonds were in Germany (R. 14). According to information now in the possession of the Government, the three bonds had been in Berlin, in the Russian sector, and had been seized by the occupying authorities at some time prior to the date of the Vesting Order (R. 33).

One of the three bonds, which the APC had stated in its letter of June 17, 1949 to be in Germany (R. 14) (one of the two which had been called) had in fact already been presented for payment at the offices of the Bank in New York and had been paid in usual course before the

* It was stipulated that the Indentures, printed copies of which are on file with this Court, need not be reprinted as part of the record, but that they might be referred to by either side. Two are involved, one dated as of March 1, 1929, one as of June 2, 1930 (R. 33).

date of the Vesting Order (R. 32). The claims relating to this bond and its coupons have accordingly been dropped (R. 32). Another of the three was presented to the Bank in New York for payment on January 5, 1950 on behalf of Globe & Rutgers Fire Insurance Company—indisputably a non-enemy concern; was returned by the Bank unpaid because of the Vesting Order, and is now apparently in New York in the possession of a New York brokerage firm (R. 32-33). The whereabouts of the third bond is unknown (R. 33).

Neither of the governing Indentures makes provision for the issuance of a new debenture to replace one already issued, unless the instrument has been mutilated, destroyed, lost or stolen, *and* provision made for adequate indemnity satisfactory to the debtor and the trustee against possible liability. (See particularly Art. II, Sec. 9 of each Indenture; also R. 33-34.) In each Indenture the debtor covenanted not to issue any debentures thereunder except in accordance with its provisions. (See Art. III, Sec. 6 of each Indenture.) Payment either of the bearer debentures or of the coupons appertaining thereto is conditioned upon presentation of the instruments. (See the form of bearer instrument quoted at the beginning of each Indenture.)

The present action was instituted January 30, 1950 (R. 1). The District Court (McGohey, *D. J.*) granted petitioners' motions for summary judgment* (R. 49-50). The court held that, since in the case of a negotiable bearer bond the instrument embodies the property right, the Vest-

---

* The Bank's answer had raised, among others, the issues whether the Vesting Order was within the authority of the Trading with the Enemy Act and the Executive Order, whether there was invalidity under the Fifth Amendment, and whether the suit should be dismissed for absence of indispensable parties (R. 22-24).

ing Order was unauthorized in that it sought to vest property which was not "subject to the jurisdiction of the United States" or "within the United States" as required by the Trading with the Enemy Act and Executive Order 9193, as amended (R. 47-48).

The Court of Appeals reversed the judgment of the District Court, and directed summary judgment for the APC (R. 62). The court, apparently relying partly on the broad language of the Act as to debts and choses in action, partly on the history of Equity's development of a remedy where bonds were lost, and partly on the practical power of the United States over the debtor and the trustee present in the United States, held that the Act could and did apply to negotiable bearer bonds of United States issue located abroad (R. 56-58). The court did not discuss what Congress in the statute and the President in the Executive Order intended in imposing the limitations that the property be "subject to the jurisdiction of the United States" and "within the United States"; and indeed the court did not mention the Executive Order at all. Recognizing the force of the argument that petitioners were under the threat of double liability because of possible judgments abroad, against which the Act's exculpatory provisions offered no adequate protection, the Court of Appeals reached the conclusion that any resultant taking of the petitioners' property would not be in violation of the Fifth Amendment, because an implied promise to compensate on the part of the United States would then arise (R. 59). It is not clear from the opinion of the court when it thought the "taking" of the obligors' property would occur or whose act would give to the obligors a present right to compensation. In some passages it would appear that the court thought that the adverse judgment of a foreign tribunal would, in some manner, amount to a "taking" *by the*

*United States;* in other passages, it would appear that the court felt that the vesting by the APC constituted the "taking" but that such "taking" would not become complete and no obligation to compensate would arise until the entry of the foreign judgment (see R. 59, 60). The court did not specify any statutory provisions under which the debtor or trustee could proceed against the United States to recover compensation. Its opinion did not consider the other constitutional problem: *i. e.*, whether the insufficiency of the statutory notice as to innocent non-enemy purchasers of the bonds, and the short statute of limitations for suits against the APC under the Act,* if coupled with inability to obtain a remedy against the obligors, would deprive such bondholders of their constitutional rights under the Fifth Amendment.

## Errors Urged

The United States Court of Appeals for the Second Circuit erred:

1. In holding that the negotiable bearer bonds involved were "within the United States" and "subject to the jurisdiction of the United States" at the time of vesting, despite the fact that neither the instruments nor their holders were shown to be here.

2. In holding that Executive Order 9193 as amended and the Trading with the Enemy Act could be construed as authorizing the vesting of these bonds located abroad.

3. In holding that the vesting could be enforced despite the fact that the performance it called for varied the obligations assumed by the debtor on the bonds and the trustee under the Indentures.

4. In construing the Act and Executive Order as permitting the vesting even though there should re-

* § 33.

sult taking and retention of property or interests of persons not determined by the APC to be "enemy nationals" or acting for "enemy nationals".

5. In holding that under the Act an implied right to compensation from the government would arise should property or interests of petitioners be taken as a result of double liability; and that such an implied right was sufficient to save the constitutionality of the Act as here applied.

6. In holding that the construction and application of Act and Order here made were consonant with the requirements of the Fifth Amendment.

## Summary of Argument

Before summarizing the arguments, we wish to stress the following questions which are fundamental to the issues here presented: (a) whether the rules which are sometimes damned with the label "situs" are not, in situations like this, rules of essential fairness, evolved over the years for cases where all parties affected are not within reach; (b) whether there are not basic differences under the statute between blocking and vesting and between the situations in which each can be applied; whether the purposes of Congress as so far enunciated cannot be achieved in the present case by blocking, whereas if vesting is carried out, statute and Executive Order are distorted and constitutional principles are endangered; and (c) whether the uncertain test of general purposes never clearly defined by Congress can safely be used to extend statutory language which already bestows unusually great powers on an executive agency.

The court below was concerned with what it deemed the practical need for this vesting program; but even in the light of that consideration, doubt remains whether the decision achieved a satisfactory result. Economic war-

fare is hardly furthered by a purported seizure of bonds where the practical consequence is that the assets go around in a circle. That is the result adumbrated by the court below: (1) the American obligor is directed to pay the APC; (2) the foreign holder—whose courts are beyond our reach—recovers abroad from the obligor; and (3) the United States Government then repays the obligor. Even if only steps (1) and (2) occurred, the professed purpose of the Act to utilize enemy assets would still not be achieved—whatever the advantages of revenue brought in by a method that would be indefensible as confiscation.

The foregoing throws light on the essential issue here: whether the APC has the right to vest—as distinguished from block—negotiable bearer bonds located abroad. The argument that the Act, the Executive Order and the Fifth Amendment all call for dismissal of this complaint is based primarily on the following contentions:

1. The Trading with the Enemy Act authorizes vesting, upon the terms designated by the President, of any foreign national's property which is "subject to the jurisdiction of the United States" (see §5(b)). Though the same limitation as to jurisdiction is not express in §7(c), it must be read into that provision, both because of general principles of statutory construction, which presume territorial limitations, and because the subsequent enactment of the limitation in §5(b) compels that result. To the extent that the Executive Order in delegating authority to the APC, pursuant to the statute, narrows the scope of that authority, the more rigid requirements of the Executive Order will be controlling. By Executive Order 9193, as amended, the APC's authority to vest

in this instance exists only if the property is that of an enemy national and is "within the United States."

A negotiable bond cannot be said to be subject to the jurisdiction of or within the United States if neither the instrument nor its holder is here. The rule is often expressed in terms of *situs*, or the doctrine that the property inheres in the instrument, but back of it lies the realization that, because of the necessity of free transferability and the resultant rights of the bona fide purchaser against the obligor, it would be unfair to the latter in the case of a negotiable instrument to make him pay other than the holder while the instrument is still at large and the holder not within control. There has been generally recognized a difference in this respect between a debt embodied in a negotiable instrument and a simple debt, and between a negotiable bond and a stock certificate.

When Congress legislated, the limitations on jurisdiction in regard to negotiable instruments were generally recognized. There is nothing in the statute itself or in the legislative history to indicate that Congress intended to alter the accepted rules in this respect.

2. To the extent that the vesting is ineffective as a seizure of the bondholder's rights—and the force of the argument that it is thus ineffective abroad was recognized by the court below—what is being seized is not the enemy's rights in the bond, which cannot be effectively divested, but the obligor's own property. Likewise to the extent that the vesting creates a new or different obligation (to pay without either presentation of the instrument or indemnity against loss that might result from failure to present), it is the obligor's rights that are being taken. The statute and Executive Order, however, furnish no authorization for seizure and retention of the property of

citizens without enemy taint; or for vesting a nonexistent obligation. There has been no determination by the APC, or suggestion, that the Bank or Cities Service Company has any enemy taint; and the APC's finding that the debt evidenced by the bond is enemy owned is insufficient to support seizure of funds belonging to the obligors, unless their obligation on the bond is thereby terminated.

3. The construction of the Act and Executive Order given by the court below results either in actual unconstitutionality or in such serious question of constitutionality as to forbid that construction.

(a) *As to possible innocent non-enemy bondholders.* Absence of any practical notice, especially when combined with the short statute of limitations running from the date of the vesting, renders wholly illusory the theoretical remedy which § 9(a) of the Act might be argued to give to innocent non-enemy holders abroad. Hence the transfer sought by the APC, to the extent the exculpatory clauses are given effect, will result in deprivation of the property of such holders without adequate notice to them or opportunity to be heard.

(b) *As to obligors.* On the other hand, if the holders are not effectively stripped of their rights by the vesting, then what the obligors are being deprived of is their own property. No compensation or indemnity is provided for by the Act or conceded by the respondent to be proper. The theory advanced by the APC is that the exculpatory provisions are sufficient to accomplish the discharge of the obligors or, if not, that no constitutional rights are infringed.

---

* Petitioners have standing to raise the question of constitutionality as to the bondholders since otherwise the exculpatory provisions of the Act will be ineffective as a defense.

The exculpatory clauses do not provide adequate protection in the case of a suit in a foreign court. Both petitioners have assets abroad and are subject to suit in a number of foreign jurisdictions. This Court has recognized the right of a foreign court to deny the extraterritorial application of the Trading with the Enemy Act within the foreign borders.

These constitutional difficulties cannot be overcome on the theory of the court below,—namely that there can be implied a promise of the Government to pay compensation in the event of double liability, and that this implied obligation will be sufficient to preserve the constitutionality of the Act. Such an implied promise is not consonant with the statutory scheme, it being provided that the statutory remedies are exclusive. Furthermore, no claim for a taking is allowed on the basis of a constitutional right to compensation where (as here) the taking was not authorized by statute.

Moreover, whatever may be the leeway allowed in the case of a suit brought after the taking by those who have been deprived, a court may not affirmatively enforce a taking where there is no express or certain provision for compensation therefor.

4. No policy of the United States declared by Congress would be frustrated by denying validity to this Vesting Order.

## POINT I

**Negotiable bearer bonds are not subject to the jurisdiction of, or within, a country when neither the instruments nor the holders are there. Since the bonds here involved were therefore neither subject to the jurisdiction of the United States nor within the United States, their vesting was not authorized by the terms of the applicable Executive Order or by the terms of the Trading with the Enemy Act.**

### Basic Limitations of the Act and Executive Order

The Trading with the Enemy Act § 5(b), as amended in 1941 (55 Stat. 839-40), authorized vesting of property only if the property was subject to the jurisdiction of the United States. The statute (see appendix) provides, with respect to any property in which a foreign national has an interest, that the President may control a long list of actions "by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President * * *." It is clear that the words "property or interest" after the semicolon tie back to the words "property subject to the jurisdiction of the United States" immediately before.

§ 7(c) of the Trading with the Enemy Act (which was in part contained in the original Act) contains no similar express limitation that the vesting be of property subject to the jurisdiction of the United States. While § 7(c) and § 5(b) are to be harmonized so far as possible (*cf. Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480 (1947)), if they are in any way inconsistent, the provisions and limitations of § 5(b), as the more recent enactment, must control. Even in the absence of an express limitation, moreover, the

statute would be construed as "meant to apply only within the territorial jurisdiction of the United States." See *Foley Bros.* v. *Filardo*, 336 U. S. 281, 285 (1949); *cf. American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357 (1909).

And even if the statute were indefinite, the Vesting Order must be tested not only against the statutory language but against the terms of the applicable Executive Order, for under § 5(b) the property is to vest only "when, as, and upon the terms, directed by the President * * *." The powers of the APC in this respect are therefore only those given by the President. (Under § 7(c) the provisions as to vesting are preceded by the limitation "If the President shall so require * * *.")

Executive Order 9193, as amended, is the applicable Executive Order specifying what property may be vested; and its provisions, though not mentioned by the court below, are important. The only subdivision of the Order that could be applicable here, § 2(c), requires that the property be "within the United States."* Even if the property were "subject to the jurisdiction of the United States", the Vesting Order would nevertheless exceed the APC's authority unless the property were also "within the United States."

---

*"2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

* * * * *

(c) Any other property or interest within the United States of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, a designated enemy country or national thereof * * *."

See 3 C. F. R. 1943 Cum. Supp. 1174; 50 U. S. C. A. App. (1951) p. 43.

**Jurisdiction over, and Location of, Debts Embodied in Negotiable Bearer Instruments**

This Court has squarely held that a court was without jurisdiction to declare void the obligation on a negotiable instrument where the obligor, but neither instrument nor holder, was before it. *Bank of Jasper* v. *First National Bank*, 258 U. S. 112 (1922). That case, which arose in the federal courts, dealt with the effect of earlier Florida judgments by which the Florida courts had attempted among other things to determine that certain negotiable certificates of deposit of a Florida bank were void and that a Georgia bank had no interest therein. The Georgia bank had been served by publication only. When subsequently the Georgia bank brought suit in the United States District Court to enforce the certificates of deposit, there was an attempt to plead *res judicata* on the basis of the preceding Florida judgments. This Court held that those judgments were without effect. In an opinion by Mr. Justice BRANDEIS the Court declared:

> "Like other notes they are negotiable and are payable only upon surrender of the instrument properly endorsed. * * *
>
> As neither the certificates of deposit nor the holder thereof were within the State of Florida, its courts could not—in the absence of consent—acquire jurisdiction to determine the liability of maker to holder." (258 U. S. at p. 119.)

The above case* also distinguished the situation before it from that which would have obtained had the indebted-

* In the brief in opposition to the petition for certiorari, the APC attempted to distinguish that case on the strange basis that "there has been no attempt in this case to secure a determination that the petitioners, the 'maker', are not liable to the holders of the bond instruments" (p. 10, n.6). Since the whole purpose of the vesting

ness rested in open account. In that event, the indebtedness "would have been property of the creditor within the State of Florida" and "In an appropriate proceeding it might have been reached to satisfy a claim against its owner." (p. 119.) Throughout the proceedings heretofore in the instant case, the APC has persisted in citing cases applicable to simple debts very much as if they applied also to debts incorporated in negotiable instruments. The distinction between the two types of obligation is, however, fundamental in law. It has a sound basis, for the existence of the negotiable instrument subjects the obligor to a liability basically different from that of the obligor of a simple debt, because the transferor of a negotiable instrument, unlike the assignor of a simple debt, has the power to create rights in new obligees beyond those he himself has. *Cf.* Uniform Negotiable Instruments Law, § 57.

The law of New York (where the bonds are payable*) does not differ from that declared in the *Bank of Jasper* case. See *Von Hesse* v. *Mackaye*, 55 Hun 365 (Sup. Ct. Gen. T. 1st Dep't 1890), *aff'd. on the opinion below*, 121 N. Y. 694.

On the other hand, the presence of the negotiable instrument may permit dispensing with the presence of the owner; and the instrument alone supplies a sufficient basis

---

would seem to be to cut off the rights of those who the APC asserts are enemy holders," the claimed basis of distinction sounds rather like quibbling. If the vesting which this action was brought to enforce is not intended to deprive the enemy holders of their rights, then it has no conceivable justification under the statute. If it is so intended, then the result sought to be achieved is almost precisely that sought in the Florida action which was held invalid—that is, to cut off rights of the holder and to substitute the plaintiff as obligee.

* As to principal (see the forms of instrument quoted at the beginning of each Indenture). There are alternative places of payment for the coupons.

for jurisdiction *in rem* or *quasi in rem*. Thus, in cases of disputed ownership, the presence of the instrument gives basis for jurisdiction: *First Trust Co. of St. Paul* v. *Matheson*, 187 Minn. 468, 246 N. W. 1 (1932), and see Andrews, "Situs of Intangibles in Suits Against Nonresident Claimants," 49 Yale L. J. 241, 244, where the author, after reviewing the authorities, found it "safe to conclude that the situs of the bonds themselves is the only situs for jurisdiction *in rem* over obligations evidenced by bonds." Likewise the state where the instrument is may escheat the property, *e. g.*; *In re Rapoport's Estate*, 317 Mich. 291, 26 N. W. 2d 777 (1947), *cert. denied*, 332 U. S. 764-765.

Even in the area of attachment and garnishment, where, in the typical situation, the effort is not to deprive the holder of ownership but only to utilize his ownership to satisfy his obligation,* the rules as to when and how levy may be made upon negotiable instruments point to similar principles. *E. g.*, *Clark-Wilcox Co.* v. *Northwest Engineering Co.*, 314 Mass. 402, 50 N. E. 2d 53 (1943); and see Drake, *Attachment*, §§ 587, 588, in which the earlier authorities are exhaustively discussed; 2 Daniel, *Negotiable Instruments* § 930 (7th ed. 1933); Annotation, 71 A. L. R. 581; *cf.* New York Civil Practice Act, §§ 916, 917.

The rules as to jurisdiction in the cases above cited are often phrased in terms of location of the property, or *situs*. Characteristically, the physical instrument is regarded as embodying the property—much as a banknote would be. See particularly *First Trust Co. of St. Paul* v. *Matheson*, *supra*, 187 Minn. at p. 474, 246 N. W. at p. 3, *Von Hesse* v. *Mackaye*, *supra*, 55 Hun at pp. 368-9 *aff'd on opinion below*, 121 N. Y. 694. This recognized viewpoint is important in construing the meaning of the phrase "within

* This distinction is apparently alluded to in the Bank of Jasper case, 258 U. S. at p. 119.

the United States" in the Executive Order. (Compare also in the conflicts area the rule that the validity of the transfer of a negotiable instrument, like that of a chattel, is governed by the law of the place in which the transfer took place: *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, 345-6 (1934); *Weissman* v. *Banque de Bruxelles*, 254 N. Y. 488, 494 (1930).)

Under a tax statute, the Government itself has taken the position that where bonds are physically located outside the United States they are not property within the United States (while in the case of stock the presence or absence of the certificates makes no difference). The regulations of the United States Treasury Department in relation to the tax on estates of nonresident aliens under 26 U. S. C. §§ 860-863 provide as follows:

> "*Situs of property.*—Real estate, tangible personal property, and the written evidence of intangible personal property which is treated as being the property itself are within the United States if physically situated therein. For example, a bond for the payment of money is *not within the United States* unless physically situated therein. Stock of a domestic corporation, however, constitutes property within the United States, irrespective of where the certificates thereof are physically located.
>
> "Intangible personal property the written evidence of which is not treated as being the property itself constitutes property within the United States if consisting of a property right issuing from or enforceable against a resident of the United States or a domestic corporation (public or private), if not subject to the exceptions prescribed in section 863(a) and (b). * * *." (Reg. 105, § 81.50; italics added.)

To summarize:

For the purpose of jurisdiction the state which has jurisdiction over the document has jurisdiction over the

right (*Restatement, Conflict of Laws*, § 52). This rule obtains where the problem is one of legislative jurisdiction (See *Restatement, Conflict of Laws*, § 62). Or as Beale states the principle: "A bond is always regarded as situated where it is found, and action to reach and deal with bonds may therefore be brought in the state where the bonds are found; and on the other hand an action of the sort cannot be brought where neither the bonds nor the owner of them are within the state * * *." (Beale, *The Conflict of Laws*, § 103.1.)

The court below treated the idea of identification of the instrument with the property as a kind of archaic doctrine, half superstitious in origin, and dispelled by the development in equity of a remedy for the situation when bonds were lost.* To this can be opposed the approach of another great jurist. As Mr. Justice HOLMES remarked in *Wheeler* v. *New York*, 233 U. S. 434, 439 (1914):

> "It is not primitive tradition alone that gives their peculiarities to bonds, but a tradition laid hold of, modified and adapted to the convenience and understanding of business men. The same convenience and understanding apply to bills and notes, as no one would doubt in the case of bank notes, which technically do not differ from others."

It is also noteworthy that the equitable remedy on which the opinion below relied was contingent on a protection the absence of which here should dictate the contrary result. The price exacted by equity in the case of negotiable bonds is protection of the obligor by suitable indemnity.

---

* An interesting comparison with the opinion below is also offered by the discussion in Bozant v. Bank of New York, 156 F. 2d 787, 790 (2d Cir. 1946), in which the opinion was also written by Judge Learned Hand, but in which, in dictum, the historical view is stated with apparent approval.

*See, e. g., Prescott* v. *Williamsport & N. B. R. Co.*, 159 Fed. 244, 248 (C. C. Pa. 1908). Indeed, equity jurisdiction of actions on missing negotiable bonds arose at least in part from the fact that courts of law could not require the necessary indemnity. 3 Pomeroy, *Equity Jurisprudence*, §§ 831, 832 (5th ed. 1941); see also *East India Co.* v. *Boddam*, 9 Ves. Jr. 464 (1804) (cited by the court below).

That the concept of situs may have proven inadequate in the tax field, as a test for determining when services by the state justify imposition of a tax (*cf. State Tax Commission* v. *Aldrich*, 316 U. S. 174), should not blind one to the very real function of the concept when questions of the right to seize or control property are to be dealt with.

The reasons behind the results in the cases that have been cited are clear. Because the transfer of a negotiable instrument transfers the right and a bona fide purchaser takes it free of previous defenses, and because the action on the instrument is a transitory cause of action, a court which has no control over the instrument or its holder is powerless to protect the obligor against double liability and at the same time to protect innocent purchasers against loss. There is therefore no just basis for compelling the debtor to pay, even though he is subject to the court's power. These principles (and use of the word "situs" in this connection is a shorthand way of summarizing them) apply here, since, as will be shown in more detail below, the holder is beyond the reach of the court and the exculpatory clauses cannot be relied on to discharge the obligor.

It is true that this approach is based on the rules as to the rights of a holder in due course. However, they in turn are based on the practicalities of a long history of finance and trade, first embodied in the common law as to specialties and then in the law merchant and in its modern form in the Negotiable Instruments Law. They are now

firmly embedded. They emphasize the importance of the free transfer of negotiable instruments from hand to hand, without the necessity that a purchaser in good faith go beyond the instrument itself in seeking to obtain his rights. All of these are part of the business man's dealing with a negotiable bond almost as freely as with a banknote, as far as transfer is concerned.

Nothing that the APC has so far adduced furnishes authority for discarding in the present situation these accepted rules.*

**Congressional Intent**

It was in the framework of the general recognition that the property of a negotiable bond inheres in the instrument that Congress enacted the Trading with the Enemy Act. It, like other federal statutes, perforce assumed the existence of, and sought application to, property rights and obligations as created and recognized by existing law.

---

*Moreover, though the APC purported only to vest the obligations evidenced by the bonds and the rights in, to and under the bonds, the judgment of the court below, which did not withhold any of the relief asked for in the complaint (R. 6), would apparently require payment or re-issue of unpaid coupons as well as the bonds themselves, in spite of the absence of any determination in the Vesting Order that the coupons were enemy owned and in spite of the admission of the APC that he could not ascertain what coupons were attached to the bonds at the time when he called for turnover (R. 16). It is recognized that, at least where the matured coupons have been detached and are in the hands of a separate holder, the obligation on the bond and the obligations on such coupons are distinct and separate obligations and give rise to separate causes of action. See Presidio County v. Noel-Young Bond Co., 212 U. S. 58, 75 (1909); Edwards v. Bates County, 163 U. S. 269, 272 (1896); W. S. Bank v. Town of Solon, 136 N. Y. 465, 481 (1893); Long Island L & T Co. v. L. I. C. & N. R. R. Co., 85 App. Div. 36, 39-40 (2d Dep't 1903), *aff'd*, 178 N. Y. 588 (1904). It is clear, therefore, that the Vesting Order is not sufficient to support a judgment for the relief demanded in the complaint.

Can it be said that Congress intended in the Act to overturn the rules as to jurisdiction or change the nature of property embodied in a negotiable bond? The APC below argued that inconsistent state law (statutory or otherwise) must give way to federal power; but it is submitted that no purpose or policy to accomplish such an upset can be spelled out of the provisions of the Act.

There is nothing express in the statute providing for the vesting of negotiable bonds without seizure of the instruments, or defining when property is "subject to the jurisdiction." There is no provision requiring that the obligor should issue a new bond in lieu of one vested without manucaption.

It is significant in this connection that there *is* an express provision, added by amendment during World War I (40 Stat. 1020) making it the duty of a company to issue new share certificates to the APC in lieu of certificates representing vested shares. (See §7(c) of the Trading with the Enemy Act; also 56 Cong. Rec. 11430-1, 11481-2.)

The court below placed some reliance on general breadth of the statutory language as to what property is to be vested (R. 56). Of course it is not disputed that the statutory language authorized seizure of "debts" without limitation to a particular type of debt, and that bonds can therefore be vested. It does not follow that all bonds and debts wherever located can be vested. The word "property" is very inclusive; but no one would contend, for example, that the turnover of gold bullion physically located in Brazil and owned by a German in Germany could be compelled under our Trading with the Enemy Act, though the bullion is unquestionably "property." In both instances the vesting power is limited to the situation where the property is "subject to the jurisdiction." The bullion in Brazil does not satisfy *that* limitation merely because it is property;

nor do the bonds in Germany merely because they embody debts.

The court below appeared to rely on § 9(n) of the Trading with the Enemy Act (enacted—see 45 Stat. 272—as part of the Settlement of War Claims Act of 1928) as indicating Congressional recognition that there had been under the original Trading with the Enemy Act authority to seize bonded indebtedness without seizure of the instrument itself. In the first place, however, the Act, in § 7(d), made provision for voluntary payments or transfers to the APC, and § 9(n) refers to returns in such cases as well as in cases of vesting. Moreover § 9(n) was a remedial provision relating to returns to purchasers or assignees of securities where there had been a vesting or "transfer" without seizure of the instrument: the fact that Congress subsequently felt impelled to give a remedy in that situation does not indicate Congressional approval of previous vestings of negotiable instruments without seizure of the instruments, if there were any such. On the contrary, Congress expressly provided that the transfer to the APC should not be deemed to have invalidated subsequent transfers of the instruments. Even more important, however, is the fact that at most § 9(n) suggests no more than that non-negotiable bonds might have been so seized or transferred. The language of the Congressional Reports (Sen. Rep. No. 273, at p. 30, H. R. Rep. No. 17, at p. 21, 70th Cong., 1st Sess.) suggests indeed that stocks were primarily in mind since the reference in each case is to the "certificate." The Reports similarly refer to "assignments," which is not a term associated with the negotiation of bonds.

There is then nothing in the Trading with the Enemy Act itself to indicate that as to bonds Congress intended to authorize their vesting without seizure of the instru-

ments, especially where the latter were outside the United States.

When we come to the legislative history of the Act, and particularly the history of the amendments to the Act just before and during World War II, that record is seen to be similarly barren of any material to support a contention that Congress intended in the case of bonds to depart from the usual meaning of "subject to the jurisdiction" or usual concepts of the nature of a bond.

Because the APC below placed emphasis on the amendment of § 5(b) in 1940 (54 Stat. 179), and contended that Congress then understood the amendment and also the Executive Order and Regulations which it ratified to apply to bonds abroad, the circumstances of that amendment may be recalled to mind. What was there being discussed was not vesting but blocking. The bases of jurisdiction clearly differ for the two.*

The 1940 amendment was brought about primarily because of doubts expressed (though these doubts professedly were not shared by government officials) as to whether the statute as it previously stood was adequate to authorize *any* controls over transfers of bonds and stocks (see Sen. Rep. No. 1496, 76th Cong., 3d Sess., printed at 86 Cong. Rec. 5169; see also 86 Cong. Rec. 5006, 5175). An examination of the original Executive Order concerned with blocking (Executive Order 8389), as it was issued in April 1940 (3 C. F. R. 1943 Cum. Supp.,

* Broadly speaking, Executive Order 8389 as amended (31 C. F. R., 1949 Ed., §§ 127.9-127.17), the Order relating to blocking, utilizes jurisdiction over persons to prohibit a wide series of transactions, and thus preserve the status quo. It is designed to have its primary impact at the time and place of attempted presentation or dealing or paying here. Executive Order 9193 as amended (3 C. F. R. 1943 Cum. Supp. 1174), the Order relating to vesting, necessarily depends on the other hand on jurisdiction over the property or business to be vested.

p. 645) and as it was ratified (54 Stat. 179) by Congress in May 1940, reveals how uncertain was the application of that Order to stocks and bonds at all, except in so far as a transfer of credit or payment by a bank might be involved. Nevertheless the Treasury in a ruling had construed it to cover (a) transfers by a banking institution *within the United States* of *stock certificates* from or into the names of the foreign "nationals"; and (b) delivery or receipt of *securities* into or out of custody accounts *here* (see General Ruling No. 2 reprinted at 86 Cong. Rec. 5171). It was evidently this ruling that gave rise to the doubts already mentioned (see the Senate Report above cited, 86 Cong. Rec. 5169). The whole of the Congressional action must be understood in the light of the precise controls thus provided for.

The First War Powers Act of 1941 amended § 5(b) so as to make it cover vesting specifically (55 Stat. 839). Under this amendment the specified actions which the President might control in the specified ways were those "by any person, or with respect to any property, subject to the jurisdiction of the United States"; and the statute then went on to make specific provision with respect to the time, manner and terms of vesting of such property (see 87 Cong. Rec. 9862). An express limitation with respect to property was thus inserted, simultaneously with the provisions relating to vesting.

It is fallacious to assume that the earlier legislative history relating to blocking indicates an intent as to the applicability of the vesting provisions to bonds physically located abroad. The language of the statute itself negatives any idea that Congress intended that blocking and vesting be co-extensive.* To name one obvious differ-

* See Bishop "Judicial Construction of the Trading with the Enemy Act," 62 Harv. L. Rev. 721, 723, 749-50 (1949); cf. Propper v. Clark, 337 U. S. 472, 477, n.8 (1949).

ence, § 5(b) authorizes blocking of property if any interest therein is owned by a foreign national; while there can be vesting only to the extent of the property or interest of the national—a much narrower area.

In summary, it is submitted (a) that in the absence of an unmistakably clear indication of a purpose to do so, intent to overturn basic and generally accepted legal concepts cannot be assumed; and (b) that there is in the legislative history nothing to establish such an intent. If, however, it could be concluded that Congress (1) intended to authorize vesting of negotiable bonds located abroad and (2) had the jurisdictional power so to do and (3) had adequately expressed such intent or purpose in the statute, nevertheless, the Executive Order has in relation to securities expressly limited the power to vest to property "within the United States".

**Court Decisions under the Trading with the Enemy Act**

The important fact in regard to court interpretations of the Trading with the Enemy Act is that, so far as can be discovered, neither in World War I nor in World War II has there been a single decision as to the power to vest negotiable instruments (if in this country) without seizure or demand on the holder; nor has there been a test as to the power to vest negotiable instruments while the instruments themselves were outside the country. The present test is the first, and the Vesting Order here involved was issued in 1949, long after the shooting war with Germany and Japan was over. In spite of the APC's protestations, this delay in attempting such vesting is at least indicative of long-standing administrative practice contrary to the interpretation here sought to be sustained; and it may also suggest that such vestings

are hardly so essential to the war effort as the APC implies.

The APC has suggested that the absence of a test was due not to any doubt of his power but to difficulty of identification of the property.* If the errors as to the three bonds here involved are representative, it may be suggested that adequate basis for identification is still lacking. As to one bond of the three, it is indisputable that there could have been no enemy interest at the time of vesting, the bond having then already been paid. (R. 32.) As to a second, the presentation here by a non-enemy concern, though occurring after vesting (R. 32), suggests a similar error. Indeed the circumstances in this case dramatically emphasize the dangers of mistake and injustice inherent in any vesting of bearer bonds without control over the instruments or their holders. They also imply the limited usefulness in the active conduct of a war of the power here sought.

In the World War I cases involving vesting of bonds, the method was evidently by seizure of or proceedings against the instruments *in rem* or by a demand on and personal jurisdiction over the holder. See, *e. g.*, *Central Trust Co.* v. *Garvan*, 254 U. S. 554 (1921); *Commercial Trust Company* v. *Miller*, 262 U. S. 51 (1923).

All the cases under the Trading with the Enemy Act so far cited by the APC as authority for vesting without seizure of certificates involved shares of stock rather than bearer bonds or other negotiable instruments. (Other cases relating to simple debts were also cited; these are inapplicable for the reasons set out above at p. 16.) As has already been indicated, the provisions of § 7(c), as amended in 1918 (40 Stat. 1020), gave specific authorization for

---

* See Brief in Opposition to Petition for Certiorari, p. 10, n. 7.

directing the issuance of new share certificates for shares vested, without requiring seizure and surrender of the old certificates by the APC. This amendment was relied on in the World War I stock cases.*

The classic view is that stock of a corporation has its situs at the place of incorporation (*Jellenik* v. *Huron Copper Mining Co.*, 177 U. S. 1 (1900)). That was the rule in the federal courts at the time Congress enacted the Trading with the Enemy Act. See *Miller* v. *Kaliwerke Aschersleben Atkien-Gesellschaft*, 283 Fed. 746, 754-5 (2d Cir. 1922). The persistence of that concept explains decisions in *Great Northern Railway* v. *Sutherland*, 273 U. S. 182 (1927) and other stock cases, which resisted the modern trend to bestow upon share certificates some of the legal attributes of bonds. In addition, such cases had the support of § 7(c) of the Trading with the Enemy Act, which expressly requires the issuance of new *stock* certificates upon demand of the APC. Such cases furnish no authority for disregarding rules historically and universally applied to negotiable bonds. Cases involving other issues, which in some instances have treated stock certificates as embodying the property for certain purposes, may suggest a basis on which the *Great Northern* case might conceivably have been decided otherwise; but they furnish no reason for extending the result of that case to apply to true negotiable instruments.

Not only historically bu as a matter of present-day business practice there is a difference in the treatment

---

* The following cases cited by the APC below are in this category: Great Northern Railway v. Sutherland, 273 U. S. 182, 189 (1927); Baltimore and Ohio Railway Co. v. Sutherland, 18 F. 2d 560 (4th Cir. 1927) (relying on the Great Northern decision); Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft, 283 Fed. 746, 754-755 (2d Cir. 1922); Columbia Brewing Co. v. Miller, 281 Fed. 289, 291 (5th Cir. 1922).

of stock certificates and negotiable bearer bonds, warranting a difference in the exercise of jurisdiction, in the absence of the instrument.

## POINT II

**The APC has no power either under the Act or the Order to vest property of Cities Service Company or the Bank, neither of which has been determined to be an enemy; nor has the APC power to accomplish what the complaint here seeks, namely the alteration of the obligations of the obligors, and the vesting of the non-existent obligations thus created.**

Despite its refusal to accept the doctrine that identifies the property with the instrument, the court below was not blind to the consequences of the kind of liability here involved. As the opinion pointed out, "* * * in the case of a negotiable instrument, like the bonds at bar, the promisee is the holder; but the Alien Property Custodian by hypothesis is not the holder. When he compels the obligor to pay him, he 'takes' the obligor's property in the constitutional sense; he totally deprives the obligor of what he collects, * * *" (R. 60). This passage—despite the reference to hypothesis—indicates recognition of the hard fact that the United States through the exercise of its power has not succeeded in getting possession of the "obligations" or the rights under the bonds; the effect of the Vesting Order, if sustained, is only to compel the payment of a sum of money to the APC without destroying the obligation of the debtor to the holder of the instrument. So long as the instrument remains outstanding, so long is the obligation not completely destroyed; for the obligation is to pay upon presentation of the instrument. What the

obligor is compelled to turn over to the APC is therefore not the enemy's property but its own.

Granted this state of facts, the Act and the Executive Order did not, we submit, empower the APC to compel the payment.

The language of § 5(b) has already been quoted. What we wish to draw attention to here is the shift from the words "property in which any foreign country or a national thereof has any interest", used in subdivision (B) which authorizes blocking, to the words "property or interest of any foreign country or national thereof", used when the statute provides for vesting. This shift must mean that while there may be blocking of the property whenever there is any interest in it held by a foreign national, the vesting permitted is only of the property or interest of the national. See Bishop, "Judicial Construction of the Trading with the Enemy Act," 62 Harv. L. Rev. 721, 723, 749-50 (1949). Likewise the applicable section of the Executive Order, § 2(b), authorizes vesting of enemy property only. It is true, of course, that as the Act has been construed, the APC has the practical power to take possession of property which is not an enemy's, because for purposes of the initial possessory action his determination of enemy character or ownership is conclusive—the remedy in case of error being a claim or suit under § 9(a) (*e. g., Central Trust Co.* v. *Garvan*, 254 U. S. 554 (1921). That is not the situation here, however. The APC is under no misapprehension of the character of petitioners; he has made no finding that they are enemies. Nor is it that petitioners are laying claim to ownership of the bonds. The difficulty is that while purportedly vesting the obligations and the rights under the bonds, the APC, because of the lack of a seizure, has failed to divest the holder of those rights,

and is asking the court to make the obligors pay over their own assets instead.

Moreover, he is asking from the obligors something they never contracted to do, and to that extent also he takes their rights. The obligations of the Cities Service Company and the duties of the Bank are governed by the provisions of the debentures and the related Indentures. As above indicated, neither Indenture makes any provision for the issuance of a new debenture to replace one already issued except under the circumstances where the instrument has been mutilated, destroyed, lost or stolen and provision has been made for adequate indemnity, satisfactory to the debtor and the trustee, against the possible liability (Indentures, Art. II, Sec. 9). No provision is made for payment either of the bearer debentures or of the coupons appertaining thereto except upon presentation of the instruments (see the form of bearer instrument quoted at the beginning of each Indenture). Whatever the obligation purportedly vested by the Vesting Order, there was in fact and law no obligation on the part of Cities Service or the Bank to pay principal and interest of the debenture or to issue new debentures otherwise than in accordance with the terms and provisions of the Indentures. As this Court has recently suggested in *McGrath* v. *Manufacturers Trust Co.*, 338 U. S. 241, 249-51 (1949) by the remand for amendment of the pleadings, the APC cannot vest a non-existent obligation or call it into being by declaring it to exist. It would seem to follow therefore that the APC cannot create an obligation different from one actually existing and then hold the supposed obligor to the terms of the APC's creation. The theory of the vesting is that the APC takes over the creditor's rights—he can take only what the creditor has. *Cf. State* v. *Standard Oil Company,*

5 N. J. 281, 298; 74 A. 2d 565, 573 (1950), *aff'd, on other grounds,* 341 U. S. 428 (1951).

The mere removal of certain requirements as to methods of proving ownership (*cf. Great Northern Railway* v. *Sutherland,* 273 U. S. 182 (1927) is readily distinguishable from this attempted alteration of the obligations of a debtor and a trustee.

## POINT III

**To apply the statute as the APC contends it should be applied would raise serious constitutional questions.**

### The Constitutional Difficulties

The situation here is one calling for application of the familiar rule that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375, 390 (1924) quoting *United States* v. *Jin Fuey Moy* 241 U. S. 394, 401 (1916) and citing earlier cases. See also *United States* v. *C. I. O.,* 335 U. S. 106, 120-121 (1948). Such doubts would be raised by the interpretation called for by the APC in this case.

1. The first question presented in this area is whether the property rights of alien friends have not been made subject to taking without compensation and without due process. The stipulated facts establish not only prior seizure by a power then ostensibly an ally, but also the high probability that prior to vesting the instruments were transferred to innocent alien friends as bona fide purchasers. (The seizure by the Russians took place prior to vesting; and the appearance of one of the bonds here before the date of vesting—R. 32—suggests that the

bonds had been disposed of before that date.) This Court has clearly indicated that if property of alien friends were taken without compensation the statute would be unconstitutional as to them. See *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 479-480 (1947).

Even apart from Chase's fiduciary relation to the bondholders, petitioners have standing to raise this part of the constitutional question, because unconstitutionality as to bondholders would affect the availability to petitioners of the exculpatory clauses of the Act (§ 5(b) and 7(e)) as a defense in a subsequent suit by such holders. Petitioners are "entitled to raise the question whether they * * * would be discharged by payment * * *." See *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 243 (1944); cf. *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 479-80 (1947).*

The holders of these bonds have not been made parties to this proceeding (R. 1, cf. 23-4) and will not be bound by it. Nothing has been shown of any effort to give them notice by publication or otherwise.

In meeting the objection of unconstitutional seizure of alien friends' property, it might be argued that § 9(a) of the Trading with the Enemy Act furnished a sufficient answer. That section, as interpreted in *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480 (1947), gives to alien friends without enemy taint the right upon seizure of their property to institute claims. The Court on the basis of this right to institute a subsequent claim, unprejudiced by the prior

* We do not understand this Court's remark in that case as to petitioners' lack of "standing to represent the interests of the pledgees" (p. 474) to mean that petitioners had no standing to question constitutionality on the basis here suggested. The subsequent discussion (pp. 479-80) seems to make clear that consideration was given to the question whether there had been a violation of the constitutional rights of the pledgees.

determination by the APC, has justified the initial effect given in the possessory proceedings to the APC's determination. See, e. g., *Central Trust Co.* v. *Garvan*, 254 U. S. 554 (1921) and *Great Northern Ry.* v. *Sutherland*, 273 U. S. 182, 194 (1927). Primary concern there, in the due process aspect, was with the right to litigate the issue whether the interest seized was indeed an enemy interest. But the essential difficulty presented in acute form in the present case is whether, in the absence of any provision for notice, such a theoretical right to be heard is protection. (It is quite possible in the present case, for example, that a purchaser in, say, Sweden, may not only be without actual notice of the source of his title, but may for years remain ignorant of the vesting.)

Historically the idea has been prevalent that seizure in itself imports some probability of notice. See *Pennoyer* v. *Neff*, 95 U. S. 714, 727 (1877). Obviously, this rationale is inapplicable to the situation of the negotiable bond where there is no seizure of the instrument. Nor do the probabilities of notice which furnish justification for the garnishment of a simple debt, properly apply to the present situation. The obligor and the trustee of bearer bonds do not know who are the owners: As to the foreign purchaser abroad, there is no real provision for notice of the seizure. Certainly publication of the Vesting Order in the Federal Register is not constructive notice to him. The fact that he would not think of his property as being in the United States, but would in all probability accept the established view that his property inheres in the instrument, makes it unreasonable to hold him to knowledge of publication in Washington.

The statute of limitations in this instance runs from the time of vesting or seizure (see 50 U. S. C. A. App. § 33). The effect will be to divest all interest of any non-enemy

bona fide purchasers in the property within the two-year period set by the Act. It is clear that in the absence of provision for reasonable notice to the owner of the property, the protection of § 9(a) is utterly illusory.

In a comparable situation where the time for loss of rights ran from state seizure, this Court indicated the necessity of notice to satisfy constitutional requirements of due process. *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 243-7 (1944). See also *Connecticut Insurance Co.* v. *Moore*, 333 U. S. 541, 547 (1948). Notice for purposes of making a judicial decree binding may furnish an analogy (*cf. Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 315-7 (1950) and *Standard Oil Co.* v. *New Jersey*,* 341 U. S. 428, 434-5 (1951), but it is submitted that, in view of the confiscatory purpose of the Trading with the Enemy Act, requirements for notice "appropriate to the nature of the case" (339 U. S. at p. 313; cf. 321 U. S. at p. 246) should be more stringent for vesting than in those situations where long neglect of property by the owner justifies a presumption of abandonment and the assumption that "proceedings against it deprive him of nothing" (see 339 U. S. at p. 316) or in situations where others notified can represent a class although some members may not have had adequate notice (see 339 U. S. at p. 319). It is urged that constitutional requirements of reasonable notice are here unsatisfied.

2. The second constitutional question presented is whether petitioners' property is not being taken for public use without just compensation. As the court below

---

* This case did not, of course, present in this Court the question of the right of New Jersey to escheat debts embodied in negotiable instruments outside the state. See 341 U. S. at page 432, note 2.

phrased its view as to an obligor subjected by the vesting to double liability, "it would be hard to find any answer to his claim that the Constitution protected him" (R. 61). Unless the exculpatory provisions of the Act (§ 5(b) and § 7(e).) are sufficient to prevent such a result, petitioners would still be subject to suit by bondholders after having paid the APC.

The court below proceeded on the hypothesis that petitioners would not be protected by these provisions from double liability abroad, and indeed such a conclusion appears to be inevitable. It is not difficult to forecast the probable reaction of a neutral European forum to a statute construed as permitting a seizure, by mere demand on the obligor here, of negotiable instruments held abroad, to the complete defeat of the rights of an innocent holder in the state of the forum. The difference is obvious between such a seizure and the modification effected through control of the monetary system as in the Gold Clause cases (see the APC's Brief in Opposition, p. 16); nor is the reaction of our own courts (especially when dealing with United States statutes) necessarily indicative of that of the foreign courts.

In order to carry on its international banking functions, the Bank maintains branches in England, post-war Germany and Japan, Cuba and Panama, and keeps large balances elsewhere abroad; and it is therefore particularly subject to suit in many foreign countries. Cities Service Company likewise has assets abroad. If, after refusal of payment here, a non-enemy holder in due course of the bonds which the APC claims to have vested were by attachment of such assets to bring action against Cities Service Company or the Bank, in Switzerland, for example, the first question before the Swiss court would be that of the proper choice-of-law rule. Even assuming that the

law to be applied would be the law of the [place of the] obligation,* and even assuming that the effect given the vesting by federal statute would be regarded as part of that law, so as to displace the provisions of § 57 of the Uniform Negotiable Instruments Law,** it seems evident that the foreign forum would decline to give effect to the Vesting Order and exculpatory provisions as effectuating the discharge of the obligation.***

---

* Cf. Nussbaum, Deutsches Internationales Privatrecht, unter besonderer Berücksichtigung des osterreichischen und schweizerischen Rechts (1932) § 48 at pp. 330-336.

** N. Y. Negotiable Instruments Law § 96. This is the section providing that the holder in due course holds the instsument free from defenses available as against a prior party. With only a few minor variations it is in effect in all states. See 5 U. L. A., § 57 and Table III.

*** This refusal to give the statute effect might be either on the ground that such vesting orders are "restrictions administratives et pénales," or "purement politique," and therefore subject to the principle of "stricte territorialité," (see Freutel, "Exchange Control, Freezing Orders and the Conflict of Laws," 56 Harv. L. Rev. 30, 45 (1942), and cases there cited) or else on the more explicit ground that to give effect to such measures, even as a defense to the obligor, would violate the "ordre public" of the forum. The Swiss courts have been notably consistent in refusing to give any legal effect whatsoever to such attempted governmental basic alteration or virtual extinction of the obligation, and this even though the contract or obligation was governed by the law of the country now attempting such modification. Rheinische Grundstücks-Handelsgesellschaft m.b.h. gegen A.-G. für Immobilienwerte, 61 II Entscheidungen des schweizerischen Bundesgerichtes—Amtliche Sammlung (Arrêts du Tribunal Fédéral Suisse—Recueil Officiel) [hereafter: BGE] 242 (1935); Nathan-Institut A. G. gegen Schweizerische Bank für Kapitalanlagen, 60 II BGE 294 (1934); Guigue, Déchandon, Auclair et Cie. contre Stromeyer, 40 BGE 483 (1914) (semble), *see also* Bickel & Cie. gegen Schürch, 62 II BGE 108, 110 (1936). In all these cases, the contract or obligation was governed by either German or French law; in each case, the efforts of that state to modify that obligation which its law had originally created was refused effect

The refusal of Continental courts to give effect to these measures of economic warfare has been remarked by many noted authorities. Martin Wolff, *Private International Law* (1950) 473; Adolf F. Schnitzer, *I Handbuch des Internationalen Privatrechts* (3d ed. Basel 1950) 220; Ernst Rabel, "Situs Problems in Enemy Property Measures," 11 Law & Contemp. Prob., 118, 122 et seq. (1945); Freutel, "Exchange Control, Freezing Orders and the Conflict of Laws," 56 Harv. L. Rev. 30 at 44 *et seq.* That this attitude, especially on the part of the neutral nations, is as strong as ever was shown by the unqualified refusal of the Swiss, in the negotiations leading to the 1946 Washington Agreement, to agree to any forced transfer of German-owned property within Swiss territory unless full compensation were assured the German owners.*

In the Brief in Opposition to the Petition for Certiorari (pp. 14-15) as well as in the brief below, the APC cited *Railroad Co.* v. *Collector*, 100 U. S. 595 (1879), as authority for the proposition that double liability for the petitioners abroad did not present a constitutional question. That case, like *United States* v. *Erie Railway Co.*, 106 U. S. 327 (1882), which followed it, was decided as a question of the incidence of taxation, not as a prob-

---

by the Swiss courts, and the contract or obligation enforced against the obligor precisely in accordance with its original terms. The German exchange control ("Devisen") laws were characterized by the Swiss Federal Tribunal in the above-cited decisions as attacks on the rights of creditors repugnant to the fundamental principles of Swiss law, and as measures of force then taken unilaterally by a foreign state to protect her own economic interests to the detriment of those of other nations. See Wolff, Private International Law (1950) p. 473n.

* See Paul Guggenheim, "Die Schweiz, das alte und das neue Völkerrecht", 26 Schweizer Monat Hefte 321 (No. 6, September 1946); N. Y. Times, 1946, Apr. 8, p. 4, col. 5; Apr. 13, p. 11, col. 4 and Apr. 29, p. 4, col. 5.

lem of whether double liability would violate the Fifth Amendment. The Court construed the tax, the validity of which was in question, as one on the earnings of the corporation and sustained it on that basis. (See 100 U. S. at p. 598). The Court treated as immaterial the question whether the corporation could to the extent of the tax relieve itself of its obligation to pay interest on its bonds—a deduction authorized by the statute. Power to tax a domestic corporation, regardless of the corporation's recoupment of the tax, undoubtedly exists; but its existence forms no basis for holding that there would be power to exact double payment of the debt, not as a tax but by a seizure which in theory was a seizure of the right of the obligee.

The APC's argument that no constitutional right is violated ignores the necessary conclusion that, to the extent the APC's action is ineffective as against the obligees of the debt on the bonds, it is the obligors' property which is being taken by enforcement of the vesting.

This Court has conceded the right of a foreign court to deny extraterritorial application of the Trading with the Enemy Act so as to affect rights within the foreign country. See *Ingenohl* v. *Olsen & Co.*, 273 U. S. 541 (1927). In that case plaintiff owned a business and related trademarks in the Philippine Islands. He expanded the business into Hongkong and registered the trademarks there. During World War I the APC seized the property " 'wheresoever situate in the Philippine Islands * * * including the business as going concern, and the good will, trade names and trade-marks thereof, of Syndicat Oriente,' * * *" (p. 543). Subsequently these properties were sold by the APC to defendant. Plaintiff then sued defendant in Hongkong and there obtained a judgment declaring that plaintiff was owner of the trademarks, enjoining defendant

from selling under the trademarks and awarding costs to plaintiff. When the plaintiff brought suit in the Philippines on his judgment for costs, this Court held that he should recover, Mr. Justice HOLMES saying (p. 544):

> "When, then, the judge who, in the absence of an appeal to the Privy Council, is the final exponent of that law, authoritatively declares that the assignment by the Custodian of the assets of the Manila firm cannot and will not be allowed to affect the rights of the party concerned in Hongkong, we do not see how it is possible for a foreign Court to pronounce his decision wrong. It will be acted on and settles the rights of the parties in Hongkong; and in view of that fact it seems somewhat paradoxical to say that it is not the law. If the Alien Property Custodian purported to convey rights in English territory valid as against those whom the English law protects he exceeded the powers that were or could be given to him by the United States."

By reasoning similar to that of the English judge in Hongkong, a court outside the United States might readily decide that a statute, executive order and vesting order construed by the United States courts to affect rights there should be treated as having no force at all outside the United States. To the extent therefore that the Bank or Cities Service is or may be subject to suit outside the United States on the debentures, the exculpatory provisions of the Trading with the Enemy Act may prove cold comfort.

**The Ineffectiveness of an "Implied" Right to Compensation by the United States to Avoid the Constitutional Questions.**

The court below, constrained to recognize the constitutional problems and acknowledging that "it would be hard to find any answer to [an obligor's] claim that the Constitution protected him" (R. 61), cut its way through

the difficulty by holding that in the event of double liability the obligors would have the right to recover from the Government, on the basis that an implied promise by the United States to pay compensation would arise from the taking for a public purpose. Although the opinion did not deal with the mechanics by which the obligors' remedy was believed to be obtainable, the cases cited by the court (see R. 59) suggest that what was in mind was a suit under the Tucker Act (see 28 U. S. C. §1491; also §1346).

Although a right to compensation is necessary to sustain the Vesting Order, and although petitioners are desirous of obtaining compensation if the Order be upheld, they have been impelled to the conclusion that such a remedy does not comport with the statutory scheme set up by Congress; and that the right is too uncertain for the Constitution to permit court enforcement of the application of the statute presently sought by the APC.

The whole constitutional difficulty arises, of course, from the construction of the statute given by the court below, which departed from the normal meaning that would be given to the restrictive term "subject to the jurisdiction of the United States." The very fact that Congress made no provision for the type of situation here presented strongly implies that no such application of the statute as was made below was in contemplation of that body.

The statutory scheme of the Act as hitherto applied may be sketched in broad strokes as follows: In the interest of speed under wartime conditions, initial seizure of property of citizens may be permitted if the APC determines (mistakenly or otherwise) that the property is "enemy" owned (under the special definitions of "enemy" developed administratively). However, the retention of property of any citizen or other person without enemy

taint is not authorized, and a remedy is available under § 9(a) for the return of any seized interest or property belonging to any such person. *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480.

That the framers of the Act felt that no provision outside the Act was necessary for the protection of non-enemies is shown by § 7(c), which provides that "The sole relief and remedy of any person having any claim to any money or other property * * * paid over to the Alien Property Custodian, or required so to be * * * shall be that provided by the terms of this Act * * *." No part of the Act makes provision for compensation in instances where double liability is imposed on obligors without enemy taint. Unless § 9(a) were deemed available to petitioners, it seems clear that not only is no remedy provided for by the Act, but that the implication of a promise to compensate is contrary to the limitations of the Act.

There are difficulties, both logical and practical, to construing § 9(a) as applicable to petitioners. What the APC declared to be vested was the obligation and the rights "in, to and under" the bonds (R. 8-9). It would be difficult to argue that petitioners had, in the normal legal sense of those words, any "interest, right or title" in *that* property, as would be required by § 9(a). If, however, petitioners were to urge in a proceeding for return under § 9(a) that what had been transferred was in fact not what was purportedly vested—namely the obligation and the rights under the bonds—but petitioners' own property, then the obvious rejoinder would be: "Assuming that what you say is so, the APC established no proper basis, and did not purport to call, for the transfer to him of your property, and the question should have been raised at the time the turnover was directed." In other words a decision now in favor of the APC's right to the turnover is, under

the particular facts of this case, necessarily also a determination that the vesting could and did reach what was purported to be vested—that is, the obligation and the rights under the bond. In this particular case there is no logical basis for differentiation between a right to initial possession and the right to retention, since both alike turn on whether the obligation to the holders can be reached by the method used. The difficulties result from the unrealistic attempt to separate the obligation from the instrument which inevitably carries the rights.

There is likewise a practicable obstacle, seemingly insuperable, to regarding the remedy under § 9(a) as adequately available. As has already been indicated, the statute of limitations for claims under the Act runs from the date of the vesting. But under the theory of the court below seemingly the taking of petitioners' property is either not effectuated or is not complete (it is not clear from the opinion which) until the judgment of the foreign court imposes liability. Obviously this not only could not in this instance, but in all probability would not in other cases, occur until after the statute of limitations had run against petitioners' claim.

The court below however seemed to be thinking not in terms of a claim under § 9(a), but of an implied claim entirely outside the terms of the statute. It cited as authority for its view *Silesian-American Corp.* v. *Clark*, 332 U. S. 469 (1947). We respectfully inquire of this Court whether the opinion in that case meant to imply more than that the pledgees (who would have an "interest" in the property there seized, in the ordinary meaning of the term "interest") had a remedy under § 9(a). If, however, the *Silesian-American* opinion meant to imply, as the court below believed, that an implied promise to compensate would arise entirely outside the statutory scheme of the Trading with

the Enemy Act, and that such a right would be sufficient to avoid constitutional difficulties, then with all deference we urge that extension to this case—where the compensation would be for a double liability which seems not to have been contemplated by Congress—calls for reconsideration by the Court of the principle of that case.

There are serious difficulties in the way of implying a right to compensation. In the first place, not only was compensation not authorized by the statute, but the taking, in the constitutional sense, was not authorized either. As has already been shown, the statute did not authorize either seizure of property outside the jurisdiction of the United States (from which double liability results), nor did it authorize the taking—i. e. retention—of property of citizens without enemy taint. Even though the APC maintains here his right to vest, he does not do so on any theory that this results in taking petitioners' property.

The taking of private property for public use is deemed to be against the common right, and authority to do so must be clearly expressed. *Delaware, Lackawanna and Western Railroad Company* v. *Morristown*, 276 U. S. 182, 192 (1928). Compensation is so far essential to the power to take for a public use "that the absence of a provision for it has been regarded as important in determining the intention of the legislature when a grant of such power is claimed." *See Western Union Telegraph Company* v. *Pennsylvania Railroad*, 195 U. S. 540, 568 (1904). It is established that no claim to a right for compensation can be recognized where the taking was not authorized by statute.* *Hooe* v. *United States*, 218 U. S. 322, 335-6 (1910); *see United States* v. *Goltra*, 312 U. S. 203, 208

* That there may be subsequent statutory ratification or adoption of the taking (Crozier v. Krupp, 224 U. S. 290 (1912)) is immaterial for purposes here.

(1941). In the cases cited by the court below as authority for its view (R. 59), wherever recovery was allowed one of the elements was that the officers of the Government had statutory authority for the taking. That element is lacking here. The holding in *United States v. North American Co.*, 253 U. S. 330 (1920), cited by the court below, that the cause of action did not accrue until the time when such authority existed (see pp. 333-4), is squarely in point as to the effect of the absence of statutory authority in defeating a claim.

Moreover, what those cases held or said was that the one deprived could recover from the Government (or in one instance that there was no right to enjoin*). They did not hold that a court should lend its powers to enforce the taking in spite of the absence of express or certain provision for any compensation at any time—a vastly different thing. If the view of the court below were accepted, it would evidently follow that no taking could be unconstitutional since the mere threat of unconstitutionality would suffice to give rise to the saving right of compensation. Such a view conflicts with the well-recognized rule that whenever private property is taken for public use "it is a condition precedent to the exercise of such power that the statute make provision for reasonable compensation to the

---

* Hurley v. Kincaid, 285 U. S. 95 (1932). The plaintiff had conceded the authority of the defendant officers and the validity of the Act, which provided for condemnation proceedings not used in his case. He attempted to enjoin a flood control plan, on the theory that the mere threat of a flowage over his land constituted a taking. The court held that there was no need to pass on the substantiye questions, since if his theory was right he had an adequate remedy at law in an action for compensation, where he could obtain everything obtainable in the condemnation proceedings which were all he claimed he had a right to. For a case where the injunction was held available, cf. Delaware, Lackawanna & Western Railroad Co. *v.* Morristown, 276 U. S. 182 (1928).

owner." *Sweet v. Rechel*, 159 U. S. 380, 399 (1895). See also *Chicago, Milwaukee and St. Paul R. R. v. Wisconsin*, 238 U. S. 491, 500 (1915); *In re Manderson*, 51 Fed. 501 (3d Cir. (1892); *Chicago, Burlington and Quincy Railroad Co. v. Chicago*, 166 U. S. 226, 238, 241 (1897); *Western Union Telegraph Co. v. Pennsylvania Railroad Co.*, 195 U. S. 540, 567-568, 570 (1904).

Where the Government invokes the aid of a court to put it in possession of property it seeks to take, it seems clear that there must be reliance upon the terms of a statute which affords to the owner "reasonable, certain and adequate provision for obtaining compensation" (*Cherokee Nation v. Kansas R. Co.*, 135 U. S. 641, at p. 659 (1890)). No statute can afford such reasonable, certain and adequate provision unless it recognizes the right of the owner to just compensation, and makes provision for the prompt determination and payment of such compensation from the public funds.

## POINT IV

**No policy of the United States declared by Congress would be frustrated by denying validity to the Vesting Order here involved.**

A contention of the APC throughout has been that the bonds should be determined to be within the reach of the statute and Executive Order in order to effectuate the broad purposes of the Act. (Cf. the Brief in Opposition to the Petition for Certiorari, pp. 5-6.) The court below was concerned at the possibility of frustrating the policy of the vesting program (see R. 61).

Though we contend that the statutory language is precise and should be controlling, nevertheless the argument raises basic questions. The first is the question as to what

precisely is the policy, and whether that envisioned by Congress coincides with that now set out by the APC. The next is whether, at the stage of the war at which these bonds were vested*—in 1949—it could be claimed to be necessary, as a part of economic warfare, to attempt to gather in assets of this type on the theory either that advantage could be drawn from them by the enemy or that their availability to the United States will assist in its battle (cf. Brief in Opposition, pp. 5-6). The time when the attempt was first made to enforce vesting of bearer bonds without seizure is an indication of the lack of true necessity—blocking served the purpose. The APC, in explaining the reason why no earlier test of his powers as to negotiable bonds was sought, has intimated that until the occupation there was no way of obtaining the necessary information as to bond numbers (Brief in Opposition, p. 10, n. 7); and this is likely also to be the situation in a future war. Third, and even more fundamental, is the question whether any thwarting of the APC's vesting program will not continue to exist quite apart from any adverse decision of this Court, because the real obstacle to what the APC would like to do in the way of reduction to possession lies in the inability of this country to control all events and laws beyond our borders. As long as foreign courts are available to bondholders, it is improbable that all collections by bondholders can be prevented, regardless of this Court's decision.

Even if a broad concept of the purpose of the Act were to be chosen as the guide to construction, the confusions as to the purpose would render the problem one of great difficulty. Particularly as to the various amend-

* By Joint Resolution of Congress in 1951 (65 Stat. 451), the war with Germany was formally declared to be ended, Congress stating, however, that the vesting power was reserved as to property which prior to 1947 was subject to vesting or seizure.

ments of § 5(b), there have at different times been somewhat different ideas as to the basic aims to be effectuated by blocking and vesting.* There seems never to have been an official administrative statement of purpose. At the risk of oversimplification, it may be said in general that in the early days of blocking the fundamental purpose was to protect the property of the invaded countries, and also to prevent benefit to Germany from such property. Congressional discussion at the time of the 1940 amendment included discussion of such aims. (See 86 Cong. Rec. 5006-8, 5172, 5176-80.) Later, after the United States had become an actual belligerent, the purpose seems to have broadened to include the full reach of economic warfare—the seizure and utilization of enemy-owned property in behalf of the United States (see H. R. Rep. No. 1507, 77th Cong., 1st Sess.; 87 Cong. Rec. 9838, 9845, 9865-6; cf. *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 475-6). Not until 1948, by the enactment of a provision that no part of the seized property was to be returned to German or Japanese nationals (62 Stat. 1246, 50 U. S. C. App. Supp. IV § 39) was it made plain that there was to be true confiscation.

Suggestive of possible variances between Congress's view of purpose and that of the APC is a program to utilize the seizures to aid countries which were to receive assistance under the European Recovery Program, through enabling them to locate and make use of at least some part of

* Cf. Reeves, Control of Foreign Funds, 11 Law & Contemp. Prob. 17 at 18, 26 (1945); Alk and Moskovitz, Removal of United States Controls over Foreign-Owned Property, 10 Fed. B. J. 3 at 3-5 (1948); Freutel, Exchange Control, Freezing Orders and the Conflict of Laws, 56 Harv. L. Rev. 30, 31 (1942); Bishop, Judicial Construction of the Trading with the Enemy Act, 62 Harv. L. Rev. 721, 721-3 (1949); Note, 41 Col. L. Rev. 1039, 1042-4 (1941).

the concealed dollar assets of their own nationals. The method was to be (1) an announcement of prospective transfer to the Office of Alien Property of administration of all blocked property not certified by the appropriate foreign government or licensed by the U. S. by a specified date; (2) a new census of blocked property; (3) making the census information available to the appropriate foreign governments, and afterwards releasing property which the foreign government found to be owned by its residents; (4) vesting accounts remaining uncertified after a deadline date, on what was termed a presumption of enemy ownership.* See the letter of Secretary Snyder, as Chairman of the National Advisory Council, to Senator Vandenberg, February 2, 1948, released to the Press on that date.

Such a program appears to be rather different from what Congress contemplated in 1940 and 1941, and not very closely connected with war purposes—at least those of World War II.

Can a safe guide to statutory construction be found in a purpose susceptible of so many convenient variations to meet administrative views of changing needs?

Assuming that the objectives were the Congressional ones of preventing benefit to the enemy and permitting utilization by the United States, must it be assumed that vesting better than blocking will perform the function? Insofar as preventing the benefits of looting is concerned, the French Minister of Finance wrote on September 26, 1945 to the Secretary of the Treasury (the letter was attached to the Treasury's Press Release No. V-75): "Application of these principles [by blocking] by your Department has effectively prevented the enemy from

* This presumption suggests in terrorem action to shake down concealed wealth of friendly aliens. Cf. Clark *v.* Uebersee Finanz-Korp., 332 U. S. 480, 487 (1947).

looting French assets in the United States during the war. . . .'' Cf. Bishop, Judicial Construction of the Trading with the Enemy Act, 62 Harv. L. Rev. 721, 722: ''The freezing program * * * seriously interfered with its [the Axis'] plans for the looting of conquered countries. * * * As it was, few neutrals cared to speculate in evidences of ownership which American law declared null and void.'' For preventing speculators from unloading securities purchased from the enemy, as well as minimizing enemy benefits from any enemy property, the utilization of blocking procedures would appear to suffice; and because of its mechanics, its choice of principal place of impact at the point of attempted liquidation in this country, and the absence of a seizure which in a short time becomes irremediable, the method of blocking seems to present fewer potentialities of ultimate harm to innocent persons, and fewer jurisdictional problems. Clearly at the time when Congress gave evidence of approving the purpose of preventing enemy benefit from looting, the only methods before it were the methods of blocking. A decision against jurisdiction to vest while the instrument remained outside the country would still leave jurisdiction to apply controls upon presentation of the instrument in this country; and thus full scope would be afforded to all Congress purposed in that connection.

In so far as concerns the objective of making enemy assets available to the United States for utilization by it, as has already been argued, this objective is hardly to be obtained by making these obligors pay the APC as long as collection can be had again from them abroad.

To conclude: We believe that had Congress intended the method here attempted by the APC it would (a) have omitted from the Act the restriction that the property to be vested be subject to the jurisdiction of the United

States; and (b) have provided expressly for indemnity for its own nationals hurt in the process of attempted vesting beyond our borders. There are possibilities of serious damage to the general welfare in the course of action now being attempted by the APC: damage to internal and foreign trade and commerce from the damage to the negotiability of negotiable instruments; danger that other nations, following our lead, may be encouraged in the attempt to confiscate at long range securities owned by our nationals; above all, there is the danger that results when nations abandon civilized self-restraint and by their assertions of extraterritorial jurisdiction make it unsafe for the individual or business, threatened with conflicting demands and the possibility of being caught between them, to venture from home to carry on the world's commerce.

Wherefore it is respectfully prayed that the judgment of the United States Court of Appeals for the Second Circuit be in all respects reversed and that the judgment of the district court be affirmed.

Respectfully submitted,

TIMOTHY N. PFEIFFER,
*Counsel for Petitioner,*
*The Chase National Bank of the City of New York.*

ROY C. HABERKERN, JR.,
REBECCA M. CUTLER,
RALPH C. MURRAY,
*of Counsel.*

THEODORE N. JOHNSEN,
*Counsel for Petitioner,*
*Cities Service Company.*

December, 1951.

# APPENDIX

## Statute

TRADING WITH THE ENEMY ACT, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. § 1 *et seq.*

Sec. 5.

* * * * *

(b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or

property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in

reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

* * * * * *

Sec. 7.

* * * * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded, shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * * *

Sec. 9.(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or

by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treas-

urer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

## Executive Order

EXECUTIVE ORDER No. 9193, July 6, 1942, 7 Fed. Reg. 5205, as amended, Exec. Order 9567, June 8, 1945, 10 F. R. 6917; 3 C. F. R., 1943 Cum. Supp. 1174.

* * * * *

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

* * * * *

(c) any other property or interest within the United States of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, a designated enemy country or national thereof * * *

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
JAN 2 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951

No. 305

CITIES SERVICE COMPANY and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

*Petitioners,*

*v.*

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY BRIEF FOR PETITIONERS

TIMOTHY N. PFEIFFER,
*Counsel for Petitioner,*
*The Chase National Bank of the City of New York.*

ROY C. HABERKERN, JR.,
REBECCA M. CUTLER,
RALPH C. MURRAY,
*of Counsel.*

THEODORE J. JOHNSEN,
*Counsel for Petitioner,*
*Cities Service Company.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951

No. 305

CITIES SERVICE COMPANY and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

*Petitioners,*

*v.*

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY BRIEF FOR PETITIONERS

### I. Respondent's Confusion in Discussing the Interpretation to be Given the Trading with the Enemy Act.

The discussion by Respondent of the various sections of the Trading with the Enemy Act, of the legislative history of that Act and of cases decided under it, has confusion dyed in its thread.

In the first place, there is a confusion between what *type* of property may be seized and where the property must be to warrant its seizure. (See, e. g., Brief, pp. 2, 10-12, 18.) There is no contention here by Petitioners that negotiable bearer bonds cannot be vested at all; the issue is as to the right to vest when the unseized instruments are physically not "within the United States." Confusion is furthered by mixing the problem of how seizure is to be effected with the problem from whom the property is to be taken. Respondent argues that actual reduction to possession is unnecessary and demand is enough (Brief, p. 12, n. 5) as if this were an answer to the problem relating to who (as between obligor and holder) is the proper subject for the demand in the case where seizure is to be effected by demand alone.

A very persistent confusion in Respondent's Brief is that between Congressional discussions relating to blocking and those relating to vesting. (See particularly pp. 13-17.) The discussions in Congress in 1940 (Brief, pp. 13-17) have nothing whatever to do with vesting—they relate solely to blocking and, as has already been developed in Petitioners' Main Brief (see pp. 24-25), the mechanics of blocking depended on control of actions in this country, and hence the requirements for jurisdiction are utterly different. That Congress may have intended in 1941 that the same classes of property as had been subject to blocking be made subject to vesting (Resp. Brief, p. 17) is not indicative of Congressional belief or intention as to the circumstances under which those classes of property could be regarded as within the jurisdiction.

Frequent shifts in Respondent's Brief between references to bonds and references to stocks enhance the difficulties. (See, e. g., n. 7, pp. 12-13, and pp. 14-16.) Respondent persistently treats these two as if they were the same

and presented similar problems as to jurisdiction. It is misleading to treat a Congressional reference to a certificate, in a context indicating that stock certificates were under discussion, as if the discussion necessarily covered negotiable bearer bonds also. Cases relating to simple debts (Resp. Brief, p. 19) are not properly applicable to debts evidenced by outstanding negotiable instruments, because of the difference in the powers of a transferor of the negotiable instrument outside the jurisdiction to give new rights to his transferee.

There is confusion in Respondent's method of reading together provisions of different dates. Thus, Respondent would rely on the subdivisions of § 7 dating from 1917 (see pp. 9-11) but without the limitations inherent in the Act as it then stood, and also without the limitations of the 1941 amendment of § 5(b). Respondent asserts (Brief, p. 10) that § 7(b) "was aimed at transfers to neutrals." The authority for this statement does not appear. The sentence in the statute from which Respondent quotes begins with a reference to transfers in violation of § 3, which prohibits, among other things, trading with the enemy by "any person in the United States." Respondent in the effort to distinguish *Silesian-American Corp.* v. *Clark*, 332 U. S. 469 (see Brief, p. 35), suggests that the reference to the requirement of "compensation" is to be understood as applying merely to the interval between the time when vesting of the property of a foreign national might take place and the time when, as a result of the outbreak of war, § 9(a) became available for the relief of those not enemies or allies of enemies. This appears to imply that vesting under § 5(b) could have taken place as soon as blocking went into effect, that is in 1940, whereas as a matter of fact, the amendment of § 5(b) to authorize vesting of foreign nationals' property did not occur until 1941, after the

outbreak of war (55 Stat. 839-40). It is true, of course, that under the present terms of § 5(b), *vesting* may be permissible in time of national emergency although there is no war—though § 9(a) read literally would then give a right to reclaim to everyone. But as of the date of the *Silesian-American* case, there had been no such interval during which there could have been vesting while the United States had no "enemies" because not at war. To interpret the *Silesian-American* case as the Respondent attempts, appears to be unjustified either by its reasoning or by the situation to which it had reference.

The net result of the slippings back and forth in time, in nature of the property involved and in type of jurisdiction relied on, is to give many false impressions. Only a most careful reading of Respondent's Brief will avail to dissipate the effect of its confusing juxtapositions.

## II. American Revolutionary and Civil War Cases and Foreign Cases Involving Wartime Seizures.

It needs to be emphasized (1) that this is the first case under the Trading with the Enemy Act involving vesting, without manucaption, of negotiable bonds located abroad, and (2) that the situation is basically different from the situation as to simple debts or stock (see Petitioners' Main Brief, pp. 15-16, 28). Respondent attempts, for the lack of Trading with the Enemy Act cases dealing with negotiable bonds, to have recourse to earlier American (Revolutionary and Civil War) cases and a few foreign cases.

The Revolutionary and Civil War cases cited by the Respondent (Brief, p. 21) contribute nothing to the understanding of the Trading with the Enemy Act since they involve radically different statutes. Moreover, in the Civil War, the Union could proceed on the assumption that it continuously had territorial sovereignty over the Con-

federate states as over other states, so that there was not the same situation as here in regard to the problem of attempted control over interests within the limits of foreign territorial sovereignty.

None of the American cases is in point on the issue in this case.

In *Ware* v. *Hylton*, 3 Dall. 199 (1796), the decision of the court was that prior payment by the debtor to a state officer, pursuant to a statute purportedly discharging the debt so paid, did *not* suffice as a defense to the debtor in a subsequent suit on the bond. The bond was a penal bond, and it does not appear that it was negotiable.

*Miller* v. *United States*, 11 Wall. (78 U. S.) 268 (1870), involved the validity of the seizure of *stocks* by notice to the issuing corporation, as sufficient to support jurisdiction for a condemnation proceeding. The preliminary monition to the marshal, in regard to which the marshal was acting in behalf of the executive branch of the Government, directed him to seize bonds and coupons as well as stocks. The return of the marshal (see p. 275) stated that he had seized the bonds and coupons (and no attack appears to have been made upon this aspect of the return). It further stated that he had seized the stocks by serving notice of seizure upon an officer of the corporation. The remainder of the case so far as concerns the validity of the seizure deals entirely with the question of the validity of this form of seizure of the stocks.* Certainly, this case

* The decree, the validity of which was in question, is mentioned as having decreed cancellation of certificates of stock, without any mention being made of bonds (p. 279); the argument for plaintiff in error on this aspect, as summarized, speaks only of stocks and not of bonds (see pp. 280-283); the argument for the United States on this aspect, as summarized, refers only to stocks (emphasizing the fact that transfers thereof could be made only on the books of the corporation) and to simple debts (see pp. 287-289). The court de-

is no authority for the proposition that the *in rem* jurisdiction of the court to condemn negotiable bonds and coupons could be exercised without the physical seizure of the instruments themselves.

In *Alexandria* v. *Fairfax*, 95 U. S. 774 (1877), the Court held that in the prior confiscation proceeding the Court had been *without* jurisdiction (because of lack of proper notice to the debtor), and the plaintiff was allowed to recover. The case, moreover, as the Court recognized, involved *non-negotiable* bonds (see p. 776), sometimes referred to as "stock", (pp. 776, 777), which were expressly stated on their face to be transferable only at the office of the auditor of the corporation (see p. 775), so that the language of the Court with reference to the applicability of *Miller* v. *United States* is explicable.

*Pelham* v. *Way*, 15 Wall. (82 U. S.) 196 (1872), must be read in conjunction with the prior decision of *Pelham* v. *Rose*, 9 Wall. (76 U. S.) 103 (1869). *Pelham* v. *Rose* involved a proceeding, by the holder and payee of a negotiable note, against the marshal and his sureties. The complaint was based on the falsity of the return to the writ of monition in an earlier confiscation proceeding involving the note, in that the marshal reported arresting the property whereas he had not seized the instrument, the latter having been outside the state. The Court

---

scribes the proceeding as one to confiscate shares of stock (p. 292); describes the condemnation and sale as having been of shares of stock (p. 293); and refers to the error assigned upon this aspect as having been that there was "no such seizure of the stocks as gave the court jurisdiction to condemn them as forfeited" (p. 294). There is some reference to "credits" (see pp. 296-298) but it occurs in connection with the language of the statute (which used the word) and the passage refers only to general principles applicable to intangibles. Bonds are not mentioned at all in connection with the discussion of this assignment of error. The dissents likewise in discussing methods of seizure refer only to stocks not to bonds (see pp. 324-326, 328-330).

held that the demurrer to this complaint should be overruled since the monition was directed toward the note, and the seizure of the instrument itself was therefore necessary. In *Pelham* v. *Way*, the court, however, held that only nominal damage had resulted from the failure of the marshal to seize the note, on the theory that the record of condemnation was *not* a bar to the recovery by plaintiff of the *debt*, since there had been no attempt to seize the debt but only the note. Although the decision may be unrealistic in the separation of the debt and the instrument, the case is *not* a holding that a debt embodied in an outstanding negotiable note is a *res* which will support jurisdiction of the Court where only the debtor and not the instrument or the holder is within the Court's jurisdiction.

In *Brown* v. *Kennedy*, 15 Wall. (82 U. S.) 591 (1872) the court dismissed a bill to foreclose a mortgage on local property, upon the defense being made of prior confiscation of the mortgage, bond and debt. It appears that the plaintiff had acquiesced in the prior decree of condemnation, obtaining an order that the money collected should be paid over to him (see p. 599). The court however preferred not to base its decision on that ground. The true basis (so far as the above circumstances were not given weight) appears in the following:

> "Seizure is essential to confer jurisdiction. But the marshal's return that he had attached the bond, mortgage, and credit, conclusively establish that a seizure was made, and that the subjects of the seizure were within the jurisdiction of the court. In this collateral proceeding the complainant is not at liberty to traverse the marshal's return." (p. 597)

The foreign cases cited do not bear either on the interpretation of our statute or on the constitutional problems

here. Moreover, *Sutherland* v. *Administrator of German Property* [1934], 1 K. B. 423 (C. A.), did not involve a bond at all. The right there attempted to be reached by rival custodians was a right of action against shipowners for damages for the loss of the goods as a result of negligence or breach of contract. (The ship on which the goods were carried had gone down in 1912.) The question presented, therefore, was not a question as to the situs of a claim to goods represented by negotiable bills of lading, but of a contract or tort claim based on negligence—in which the bills of lading would of course be part of the evidence tending to establish the claim but nothing more.

The South African case, *Randfontein Gold Mining Co.* v. *Custodian of Enemy Property* [1923] 1 S. A. L. R., App. Div. 576, may appear at first glance to be a precedent for the Respondent's position. Closer examination of the case, however, shows that the decision was based (1) upon concepts of Dutch Roman law in South Africa under which debentures did not have the legal characteristics which have been uniformly attributed to them in the United States, and (2) upon provisions of the Versailles Treaty which the South African court applied. We view this decision as an extreme and unique case in the assertion of might over a debtor within the physical power of the court.

### III. The Government's New Vesting Program in Relation to this Case.

In discussing the importance of the present decision, Respondent argues at some length the necessity of preventing successful liquidation of securities looted by the Germans (see Brief, pp. 25-27, 62-68).* Discussion of possible

* Nothing in the Respondent's argument shows that the continuance of the Government's blocking program would not accomplish the desired result. Whether or not the picture of looting and its con-

consequences of a decision here should not, however, distract the Court's attention from the facts of this case. There is nothing whatever in the record to suggest that the bonds here were looted by the Germans. On the contrary, what seems to have happened was a seizure by the Russians, as occupying authorities, of the instruments then in their territory (see R. 33), though Respondent's statement (Br. 3-5) omits reference to this information. The thing which is shocking about the facts here is the extent to which the APC in vesting the bonds as the property of a German has proceeded in the face of facts reported to the APC showing that no such ownership existed. The power has been given to the APC, upon making a determination of enemy ownership, to compel the turnover of property regardless of the correctness of the determination. The consequences have steadily increased in seriousness, because of greater power in the APC to deal with the property once seized, and the limited period for corrective action under §§ 9 or 32. It has always been assumed, however, that the APC's determination would be made in good faith. In this connection it must be emphasized that this seizure in 1945 by the Russians, allies of this country in World War II, would appear to be illegal under our law, or unenforceable because of our public policy, only by criteria which would also condemn our own confiscation of private enemy property.

That the Russians disposed of at least two of the bonds here in question is necessarily to be inferred from the cir-

---

sequences painted by the Respondent, especially in respect of securities in the Netherlands, is accurate (cf. article by Dr. J. G. Koopmans in Economisch-Statistische Berichten, Rotterdam, January 25, 1950, No. 1707; V Rechtsherstel—Maandelijks Orgaan van de Raad voor het Rechtsherstel, No. 2 (August, 1950, The Hague), pp. 436-440), the matter is irrelevant.

cumstances under which they appeared in this country (see R: 32-33). Moreover, the fact that one of the bonds (M23318) was called in 1947 and matured in 1950, by no means makes it impossible for there to be a holder in due course of the instrument (*cf.* Resp. Brief, pp. 38-9, also 30), since obviously it could have been acquired by a neutral not only prior to 1950 but prior to 1947. The purported vesting occurred in 1949 (R. 8-10). The other bond (M7029) bore a maturity date of 1969 (Complaint, R. 4-5, not denied). The calling of a bond before its maturity date does not destroy its negotiability. *Morgan* v. *United States*, 113 U. S. 476 (1885).

## IV. The Constitutional Problems.

### A. The Standing of Petitioners to Raise the Question of Unconstitutionality Because of Seizure of Non-Enemy Bondholders' Rights Without Due Process.

Respondent persists in asserting (Brief, p. 28) that the Petitioners have no standing to assert the interests of bondholders. Even apart from any fiduciary duty of the Chase National Bank, as trustee under the indentures, to protect the rights of its cestuis, Petitioners' right vicariously to present the bondholders' position for the benefit of the bondholders alone, is to be distinguished from Petitioners' right to raise the question of constitutionality in this aspect because of the effect of unconstitutionality on their own rights. If, after the statute of limitations for claims against the Government had run, non-enemy holders in due course of these bonds were to sue Petitioners on the bonds, the defense to that action would necessarily have to be the provisions of the Trading with the Enemy Act, particu-

larly the exculpatory clauses. If, however, a court of this country having jurisdiction over that claim were to find that the Trading with the Enemy Act, as it would be applied to those holders by sustaining the defense, would unconstitutionally deprive them of their property, the attempted defense would be unsuccessful. Hence on their own behalf, Petitioners necessarily must have standing now to raise the issue of constitutionality as to the bondholders, since a decision of that issue is necessary to their protection and affects their rights. (*Cf. Anderson National Bank* v. *Luckett*, 321 U. S. 233, 243 (1944), *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 474, 479-480 (1947).)

B. Constitutional Difficulties Resulting from the Taking of Petitioners' Own Property.

The fallacy that lies behind Respondent's whole treatment of this aspect of the constitutional problem lies in the treatment of the question as one merely of consequential and speculative *damage* to Petitioners, rather than as a direct taking of Petitioners' property. When an obligation on a negotiable instrument is vested, the payment which the debtor makes is a payment from his own funds and it is made directly to the Government for public purposes. It is only by a fiction that the seizure may be regarded as being that of the obligee's property rather than the obligor's; and the fiction is justified only if the legal consequence of the payment is the effectual discharge of the obligor's liability. Unless there is a complete discharge, what the Government gets, both literally and in legal effect, is the debtor's money. This aspect is indeed emphasized by the Respondent's insistence, for purposes of situs, of the presence here of the obligor and his prop-

erty. But if the location is here for purposes of jurisdiction, the Respondent should not escape the corollary of the constitutional protections to which the American obligor and his property are entitled.

The fact that it is theoretically possible that under some circumstances the obligor's continuing liability to the true obligee may not in the event be enforced, is beside the point; and the phrasing of the problem in terms merely of "double liability" gives rise to false implications. The turnover would be now, and unless the discharge is presently effected, the constitutional question arises now. There can therefore be no comfortable postponement of Petitioners' deprivation as a problem that may never occur, because the deprivation is the result of the enforcement of the statute, and that enforcement should not be directed unless the constitutional protections exist, since otherwise the obligor may be left remediless.* The destruction of the obligee's claim against the obligor is the prerequisite to a taking, since no provision for indemnity is made by the statute. The Respondent appears to regard this requirement as presenting an insuperable obstacle to the vesting program; but the statute might have provided for indemnity; and if indeed the probability that the obligor will be held liable abroad is as slight as Respondent

---

* Cases like Pflueger v. United States, 121 F. 2d 732 (C. A. D. C. 1941), *cert. denied*, 314 U. S. 617 and Duisberg v. United States, 89 F. Supp. 1019 (Ct. Cl. 1950), *cert. denied*, 340 U. S. 890 (*see* Resp. Br., p. 34) which appear to regard the restrictions of § 7(c) of the Act, (providing that the remedies under the Act are exclusive) as effective to withdraw jurisdiction over a suit against the sovereign even on the basis of a claim under the Constitution, furnish, if correctly decided, but the greater reason why the deprivation should not be affirmatively enforced by this Court in the absence of a provision for compensation.

now contends (Resp. Brief, pp. 38-40), the burden of indemnity, far from being impossible or impracticable (*cf.* Resp. Brief, p. 50), would be trifling. In the absence of a provision for indemnity, however, the test can only be whether a discharge is effected by the taking, and the non-enforcement of liability in some instances is of course entirely meaningless as long as other countries, without departing from accepted legal principles, may enforce the obligation. Respondent has, for example, done nothing to negative the clear probability of liability in Switzerland (see Petitioners' Main Brief, pp. 36-38).

Obviously there is a difference in the constitutional aspect between the situation of a debtor, particularly that of the obligor on a negotiable instrument, and the situation of one who holds an enemy's identifiable property as bailee, agent or trustee. What a bailee, agent or trustee in those circumstances would turn over to the Government would not be his own property but the identifiable property of the enemy, and any possible future liability on his part would be only on a basis of *damages* for conduct compelled by the Government, since the performance for which he contracted, namely, the turnover of the *res*, would have become a practical impossibility. But what an obligor transfers to the Government is his own property; and in order to hold him liable to the obligee on the bond, a foreign court need do no more than enforce the precise obligation he originally incurred on the bond (a performance which has not become factually impossible), disregarding the purported termination of the obligation. In view of widely accepted principles (see Petitioners' Main Brief, pp. 15-21) as to the location of the property in a negotiable bond, and the power of a holder to transfer it free of defenses available as against him, it would not

be difficult for a civilized court to reach such a result in the case of a negotiable bond, even apart from such strong views on public policy as actuated the Swiss courts in the decisions already mentioned (see Petitioners' Main Brief, p. 37). The Respondent asserts that the APC succeeds to rights of the holder (Brief, p. 37), but this is hardly the case where there is nothing but a demand on the obligor. The case which Respondent cited to support his assertion (*Commercial Trust Company* v. *Miller*, 262 U. S. 51) is a case where the negotiable bonds were held by the trustee and could physically be transferred to the APC.

The Respondent cites (pp. 41-42) a number of cases to establish the proposition that the United States will not be liable to pay compensation to Petitioners.* These cases emphasize the difficulty of recovery on the theory of an implied contract to pay the compensation required by the Constitution (which the opinion below regarded as the available remedy); but they do nothing to establish the absence of a constitutional right to provision for compensation before a court will affirmatively enforce the taking. The cases cited were cases involving incidental damage or destruction as a consequence of Governmental action, such as an occasional flooding resulting from river improvement or a flooding not anticipated as a result of an irrigation plan (the *Sanguinetti* and *Horstmann Co.* cases); the loss of profits where contracts had been frustrated by Govern-

---

*Morrisdale Coal Co. v. United States, 259 U. S. 188 (1922)
Sanguinetti v. United States, 264 U. S. 146 (1924)
Horstmann Co. v. United States, 257 U. S. 138 (1921)
Omnia Co. v. United States, 261 U. S. 502 (1923)
Mitchell v. United States, 267 U. S. 341 (1925)
Bedford v. United States, 192 U. S. 217 (1904)
Mullen Benevolent Corp. v. United States, 290 U. S. 89 (1933)
Danforth v. United States, 308 U. S. 271 (1939)

mental seizure of the subject matter of the contract (the *Omnia Co.* case), or by price control regulations (the *Morrisdale Coal Co.* case); the destruction of a business as an incident of the taking of land which was paid for (the *Mitchell* case); incidental loss of a possible source of satisfying an obligation as a consequence of Governmental seizure of land thereby made unavailable for assessment (the *Mullen Benevolent Corp.* case); or erosion resulting from natural causes which conjecturally might have been less had the Government not interrupted the process by building revetments elsewhere (the *Bedford* case). None involved enforcement of a direct conveyance to the Government for public uses, where no compensation was provided.

Obviously the present case is not one where a citizen who gives himself or his business a foreign residence must be held to have assumed the risk that when and if that country becomes an enemy, he himself may likewise fall within the enemy classification. Such cases as *Green* v. *U. S.*, 10 Ct. Cl. 466 (1874), are therefore inapplicable.

With cynical inversion of the principle, Respondent recites the rules as to diplomatic protection of citizens abroad as if those rules were an answer to the problem here. The doctrine alluded to (Brief, pp. 45-6) is the one that our courts may not give a remedy for cases of seizure or other wrong by a foreign government within its own territory (*see, e. g., Shapleigh* v. *Mier*, 299 U. S. 468, 471 (1937) and *Underhill* v. *Hernandez*, 168 U. S. 250 (1897), the remedy for such a foreign failure to meet international standards of acceptable conduct being a matter for Governmental action, to be pursued by diplomacy or war (*see* Borchard, Diplomatic Protection of Citizens Abroad (1915) §§ 14, 7, 15, Moore, Digest of International Law (1906) VI, pp. 249, 696-7). Here the prospect is not of a failure of the foreign

government to meet civilized standards—the prospect is merely that the courts there may continue to enforce an obligation according to its original terms, refusing to recognize a "discharge" resulting from a purported United States seizure. The "risk" here arises not from arbitrary foreign action—which is a risk the American abroad may have to take. The risk arises as a consequence of *home* seizure, which may be denied extraterritorial effect in the foreign country. To absolve the United States from its constitutional duty to compensate for property surrendered to it under compulsion, for public use, on a theory that "protection" against foreign governments' wrongs is a matter for diplomacy, the exercise of which is discretionary, is to give the same sinister overtones to the word "protection" it has acquired in other unhappy connections.

In the last analysis, the Respondent's argument of the right to take rests on an argument that there exists the power, because the obligors can here be compelled. Petitioners do not contest that brute power exists. But this country has customarily taken pride that its laws had a firmer basis than brute power alone, and has rejected the view, which we usually ascribe to totalitarian rulers, that whatever a government can compel it has a right to compel. Something more than bare power is necessary to justify the present action. The benefit of what is done under the Act is presumably a benefit to the United States as a whole. The theory of our constitutional provision has been that where there is a seizure for our united benefit, the loss from the seizure should not be borne by single citizens alone, but should be equitably distributed. The necessities of modern warfare may call for drastic economic action. It does not follow that ensuing losses to

blameless citizens should not be compensated, that all who benefit may help to bear the burden.

Respectfully submitted,

TIMOTHY N. PFEIFFER,
*Counsel for Petitioner,*
*The Chase National Bank of the City of New York.*

ROY C. HABERKERN, JR.,
REBECCA M. CUTLER,
RALPH C. MURRAY,
*of Counsel.*

THEODORE J. JOHNSEN,
*Counsel for Petitioner,*
*Cities Service Company.*

January, 1952

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U. S.
FILED
OCT 12 1951
CHARLES ELMORE CROPLEY
CLERK

No. 305

# In the Supreme Court of the United States

OCTOBER TERM, 1951

CITIES SERVICE COMPANY, AND THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, PETITIONERS

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statute involved | 1 |
| Questions presented | 2 |
| Statement | 2 |
| Argument | 5 |
| Conclusion | 17 |
| Appendix | 18 |


## CITATIONS

Cases:


| | |
|---|---|
| *Alexandria* v. *Fairfax*, 95 U.S. 774 | 10 |
| *American Exch. Natl. Bank* v. *Garvan*, 273 Fed. 43, affirmed, 260 U.S. 706 | 6, 13 |
| *Bank of Jasper* v. *First Nat. Bank*, 258 U.S. 112 | 10 |
| *B. & O. R. Co.* v. *Sutherland*, 18 F. 2d 560 | 12 |
| *Bernstein* v. *Van Heyghen Freres*, 163 F. 2d 246, certiorari denied, 332 U.S. 772 | 16 |
| *Bitter* v. *Secretary of State of Canada* (1944) 3 Dom. L.R. 482 | 11 |
| *Braun* v. *The Custodian* (1944) 3 Dom. L.R. 412, appeal dismissed, (1944) 4 Dom. L.R. 209 | 11 |
| *Brown* v. *Kennedy*, 15 Wall. 591 | 10 |
| *Canada Southern Ry. Co.* v. *Gebhard*, 109 U.S. 527 | 9, 16 |
| *Central Hanover Bk. & Trust Co.* v. *Markham*, 68 F. Supp. 829 | 12 |
| *Chicago, Rock Island etc. Ry.* v. *Sturm*, 174 U.S. 710 | 9 |
| *Columbia Brewing Co.* v. *Miller*, 281 Fed. 289 | 12 |
| *Compania de Inver. Int.* v. *Industrial Mtge. Bank*, 269 N.Y. 22, 198 N.E. 617 | 16 |
| *Curry* v. *McCanless*, 307 U.S. 357 | 9 |
| *Disconto-Gesellschaft* v. *United States Steel Corporation*, 300 Fed. 741, affirmed, 267 U.S. 22 | 16 |
| *First Nat. Bank* v. *Maine*, 284 U.S. 312 | 9, 11 |
| *Great Northern Ry.* v. *Sutherland*, 273 U.S. 182 | 12, 13 |
| *Harris* v. *Balk*, 198 U.S. 215 | 9 |
| *Hartmann* v. *United States*, 106 Ct. Cl. 686, 65 F. Supp. 397, certiorari denied, 330 U.S. 842 | 16 |
| *Klein* v. *Palmer*, 18 F. 2d 932 | 14 |
| *Kohn* v. *Jacob & Josef Kohn*, 264 Fed. 253 | 6 |
| *McGrath* v. *Manufacturers Trust Co.*, 338 U.S. 241 | 4 |
| *Markham* v. *Cabell*, 326 U.S. 404 | 6 |
| *Miller* v. *Rouse*, 276 Fed. 715 | 6 |
| *Miller* v. *United States*, 11 Wall. 268 | 10, 12 |
| *Mutzenbecher* v. *Ballard*, 16 F. 2d 173, affirmed, 16 F. 2d 174 | 6 |
| *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 | 16 |
| *Pelham* v. *Way*, 15 Wall. 196 | 10 |
| *Propper* v. *Clark*, 337 U.S. 472 | 6 |
| *Railroad Co.* v. *Collector*, 100 U.S. 595 | 14, 15 |
| *Randfontein Gold Mining Co.* v. *Custodian of Enemy Property*, [1923] So. Afr. L.R., App. Div. 576 | 11 |
| *Rumely* v. *United States*, 293 Fed. 532, certiorari denied, 263 U.S. 713 | 6 |
| *Schrijver* v. *Sutherland*, 19 F. 2d 688 | 12 |
| *Silesian-American Corp.* v. *Clark*, 332 U.S. 469 | 6, 9, 12, 13, 16 |

| | Page |
|---|---|
| *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428 | 9 |
| *State Tax Comm'n* v. *Aldrich*, 316 U.S. 174 | 9 |
| *Sutherland* v. *Administrator of German Property* [1934] Court of Appeal, 103 L.J. (K.B.) 244; [1934] 1 K.B. 423, 50 T.L.R. 107, 150 L.T.R. 247 | 11 |
| *United States* v. *Chemical Foundation*, 272 U.S. 1 | 6, 14 |
| *United States* v. *Pink*, 315 U.S. 203 | 11, 16 |
| *Ware* v. *Hylton*, 3 Dall. 199 | 10 |
| **Statutes and Treaty:** | |
| Confiscation Acts of 1861 and 1862, 12 Stat. 319, 589 | 10 |
| Trading with the Enemy Act, 40 Stat. 411, 50 U.S.C. App.: | |
| Section 5(b) as amended by First War Powers Act of 1941, Title III, 55 Stat. 839 | 2, 5, 13 |
| Section 7 | 7 |
| Section 7(a) | 7, 18 |
| Section 7(b) | 7, 18 |
| Section 7(c) | 2, 5, 6, 7 |
| Section 7(e) | 7, 13, 19 |
| Section 9(a) | 2 |
| Section 9(n) | 7, 8, 20 |
| Section 17 | 4 |
| Section 40 (Act of Sept. 28, 1950, c. 1094, 64 Stat. 1079) | 15, 21 |
| Treaty of Berlin, 42 Stat. 1939 | 14 |
| **Executive Orders:** | |
| 2729-A, Oct. 12, 1917, Meares, *The Trading with the Enemy Act*, pp. 559, 566 | 6 |
| 2813, Feb. 26, 1918, Meares, *The Trading with the Enemy Act*, p. 584 | 6 |
| 3016, Dec. 3, 1918, Meares, *The Trading with the Enemy Act*, p. 617 | 6 |
| 6694, May 1, 1934, 28 C.F.R. (1st Ed. 1939) § 4.1 | 6 |
| 8136, May 15, 1939, 4 F.R. 2044 | 6 |
| 9095, March 11, 1942, 7 F.R. 1971 | 6 |
| 9142, April 21, 1942, 7 F.R. 2985 | 6 |
| 9193, July 6, 1942, 7 F.R. 5205 | 6 |
| 9567, June 8, 1945, 10 F.R. 6917 | 6 |
| 9788, Oct. 14, 1946, 11 F.R. 11981 | 2, 6 |
| **Miscellaneous:** | |
| 71 A.L.R. 581 | 10 |
| Brussels Agreement, State Dept. Bull., Jan. 4, 1948, Vol. 18, No. 444, p. 6; *idem*, Feb. 19, 1951, Vol. 24, No. 607, p. 293 | 15 |
| Canadian Revised Regulations Respecting Trading with the Enemy (1943) | 11 |
| 38 C. J. S. § 102 | 10 |
| Powell, *The Business Situs of Credits*, 28 W. Va. L.Q. 89 | 9 |
| S. Rept. 273 on H.R. 7201, 70th Cong., 1st Sess., p. 30 | 8 |
| Vesting Order No. 12960, 14 F.R. 1405 | 3 |

# In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 305

CITIES SERVICE COMPANY, AND THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, PETITIONERS

*v.*

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 43) is reported at 93 F. Supp. 408. The opinion of the United States Court of Appeals for the Second Circuit (R. 55) is reported at 189 F. 2d 744.

### JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1951 (R. 62). The petition for a writ of certiorari was filed on September 8, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

The statute here involved is the Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. §§ 1-40. Petitioners have set forth in the Appendix to their Petition, Sections 5(b), 7(c) and 9(a) of the Act. Other pertinent provisions are Sections 7(a), (b), (e), 9(n) and 40, which are set forth in the Appendix hereto, at pp. 18-21.

## QUESTIONS PRESENTED

1. Whether the provisions of the Trading with the Enemy Act which authorize the vesting of "any property or interest", including "choses in action and rights and claims of every character and description", confer the right to enforce an obligation of a domestic corporation evidenced by a negotiable bearer bond not itself seized.

2. Where the Custodian has vested an obligation determined to be enemy owned, is the certain availability of a remedy to protect the American obligor from the consequence of a foreign court's possible refusal to recognize the seizure necessary to the constitutional validity of the Custodian's action.

## STATEMENT

On March 11, 1949, the respondent, as successor to the Alien Property Custodian,[1] issued Vesting Order No. 12960, 14 F.R. 1405 (R. 8-10). By that

[1] By Executive Order No. 9788 (11 F.R. 11981, October 14, 1946), the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this brief, the term "Custodian" will be used, as the context may require, to refer either to the Alien Property Custodian or to the Attorney General as his successor.

Order, he vested in himself the debts or obligations evidenced by three Cities Service Company 5% Gold Debenture Bearer Bonds of $1,000 face value each, upon findings that the obligations were owned by, or owing to, a named resident of Germany and national of a designated enemy country. The Order further identified the bonds as bearing serial numbers M 23293, M 23318 and M 7029 (R. 8-9). A copy of the Order was served on the Company (R. 11) and, by subsequent letters, the Company was directed to cancel two of the bonds which had been called for redemption, and to issue in lieu thereof its check representing the proceeds of redemption with accrued interest. The Company was also directed to cancel the third bond and to issue in lieu thereof a new bond and to have affixed thereto the number of coupons which had not been presented for payment. (R. 13-20.)

One of the bonds (M 23293) had been paid prior to the issuance of the vesting order, and, with respect to this one, the Custodian withdrew his claim (R. 32). Neither of the two bonds remaining in issue is in the possession or control of the Custodian. One (M 7029) is apparently in possession of Dominick & Dominick, a brokerage firm in New York City. The present location of the other (M 23318) is unknown. The bonds were reported to have been in Berlin prior to the issuance of the vesting order. (R. 32-33.)

The indentures under which the bonds were issued designated the Chase National Bank of the City of New York as trustee and paying agent (R.

25). Upon the Company's failure to comply with the Custodian's demand, the Custodian instituted the present action under Section 17 of the Trading with the Enemy Act (40 Stat. 425, 50 U.S.C. App. 17), in which the Bank was joined as defendant, seeking payment of the obligations or the issuance of new bonds (R. 3-7). Each party moved for summary judgment (R. 37, 39, 41). The District Court held that the location of the bonds outside the United States placed the obligations they represented beyond the reach of the Custodian's authority on the ground that the obligations have no existence apart from the bonds (R. 47-48). Accordingly, it granted the petitioners' motions for summary judgment (R. 49-50).

The Court of Appeals reversed and directed summary judgment for the respondent (R. 62). The court held that the Trading with the Enemy Act granted the power to reach obligations of an American debtor evidenced "by bonds outside the country, as well as any of other alien held choses in action" (R. 58). It further held that the power of the United States to do so is not affected by the physical location outside the United States of the bond, so long as the obligor is present in this country. The Court of Appeals also indicated that the petitioners will have a claim against the government in the event that a foreign court refuses to recognize payment to the respondent as a defense and enters judgment against them in a suit by the bondholder. The court assumed "for argument that, if it were true that [petitioners] remain ex-

posed to such a recovery, and will have no consequent claim against the Treasury for recoupment, a judgment against them will 'take' their property without compensation in violation of the Fifth Amendment" (R. 59). Since the court was satisfied that petitioners would have a claim, it did not reach the constitutional question which it assumed the absence of a claim would raise.

## ARGUMENT

1. The court below held that the obligation of a domestic corporation to an enemy national may be vested under the provisions of the Trading with the Enemy Act, notwithstanding that it is evidenced by a negotiable bearer bond not itself seized. This holding is in accordance with the comprehensive language of the Act and its purpose, repeatedly acknowledged by this and other courts, to reduce to possession all property from which the enemy could draw advantage.

Section 5(b) of the Act, as amended by Title III of the First War Powers Act of 1941, in broad terms confers the authority to vest "any property or interest of any foreign country or national thereof * * *." Section 7(c) more explicitly provides that "If the President shall so require any money or other property including * * * choses in action, and rights and claims of every character and description owing or belonging to * * * an enemy * * * shall be * * * paid over to the * * * Custodian, or * * * may be seized" by him.[2] As this Court has

[2] The authority under Section 5(b) is delegated to the Custodian by Executive Order No. 9095, March 11, 1942,

repeatedly declared, these provisions are designed to reduce to possession all enemy property that can be reached so as to prevent enemy use thereof and to permit affirmative use by the United States. *Propper* v. *Clark*, 337 U.S. 472, 481, 484; *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, 476; *United States* v. *Chemical Foundation*, 272 U.S. 1, 9-10.

Unquestionably, the Act authorizes the seizure of "debts." *McGrath* v. *Manufacturers Trust Co.*, 338 U.S. 241, 246; *Propper* v. *Clark*, 337 U.S. 472.[3] And the comprehensive statutory language and the

---

7 F.R. 1971, as amended by Executive Order No. 9193, July 6, 1942, 7 F.R. 5205, and Executive Order No. 9567, June 8, 1945, 10 F.R. 6917.

By a series of Executive Orders, the powers granted by Section 7(c) have been delegated to the present Custodian. Executive Orders No. 2729-A, October 12, 1917, set out in Meares, *The Trading with the Enemy Act*, pp. 559, 566; No. 2813, February 26, 1918, *id.* p. 584; No. 3016, December 3, 1918, *id.* p. 617; No. 6694, May 1, 1934, 28 C.F.R. (1st ed. 1939) § 4.1; No. 8136, May 15, 1939, 4 F.R. 2044; No. 9142, April 21, 1942, 7 F.R. 2985; No. 9788, October 14, 1946, 11 F.R. 11981.

That the Custodian, "in taking over the administration of the Trading with the Enemy Act, is entitled to the full scope of its permanent provisions whether found in Section 5(b) * * * or elsewhere" is not open to question. *Markham* v. *Cabell*, 326 U.S. 404, 423-424 (concurring opinion).

[3] To the same effect: *Mutzenbecher* v. *Ballard*, 16 F. 2d 173 (S.D.N.Y.), affirmed, 16 F. 2d 174 (C.A. 2); *Rumely* v. *United States*, 293 Fed. 532, 548 (C.A. 2), certiorari denied, 263 U.S. 713; *American Exch. Nat. Bank* v. *Garvan*, 273 Fed. 43 (C.A. 2), affirmed *sub nom. Simon* v. *American Exchange Nat. Bank*, 260 U.S. 706; *Miller* v. *Rouse*, 276 Fed. 715 (S.D.N.Y.); *Kohn* v. *Jacob & Josef Kohn*, 264 Fed. 253 (S.D.N.Y.).

scheme of Section 7 leave no doubt of a legislative purpose to include all debts, however evidenced. Thus, Section 7(a) requires any person "indebted in any way" to an enemy to report the fact to the Custodian. Section 7(b), which was aimed at transfers to neutrals by enemy obligees, declares that the transferee shall have no right or remedy against the obligor by virtue "of any assignment, indorsement, or delivery to him of any debt, bill, note, or other obligation or chose in action by * * * an enemy." Section 7(c), as already noted, authorizes seizure of "any * * * property including * * * choses in action, and rights and claims of every character and description." Section 7(e), dealing with the discharge of the obligation paid over to the Custodian, provides that the Custodian "shall, in case of payment to * * * [him] of any debt or obligation owed to an enemy * * *, deliver up any notes, bonds, or other evidences of indebtedness or obligation * * * that may have come into [his] possession * * *."

The authority conferred by Section 7(c) to reach a bonded indebtedness without seizure of the bond itself is explicitly reaffirmed by the provisions of Section 9(n) of the Act. 45 Stat. 272, 50 U.S.C. App. 9(n). That Section was added in 1928 by the Settlement of War Claims Act which provided in general for the return of 80% of all seized property. For the cases where a stock or bond interest had been seized without actual seizure of the stock certificate or the bond, Section 9(n) provided for an 80% return to the current owner

of the instrument.[4] By this provision, Congress in terms affirmed the Custodian's power to seize an interest represented by a bond irrespective of whether he had taken the actual instrument.[5]

There is not a word in any of these statutory provisions which would warrant attributing to Congress a purpose to except from the broad authority thus conferred the power of the Custodian to seize an interest because it is represented by a negotiable bond or because the holder of the bond is not within the United States. Indeed, to impute such a purpose to Congress would be, *pro tanto,*

---

[4] Section 9(n) provides:

"In the case of property consisting of stock or other interest in any corporation * * * or of bonded or other indebtedness thereof, evidenced by certificates of stock or by bonds * * * where the right, title, and interest in the property (but not the actual certificate or bond * * *) was * * * seized by [the Custodian]," the current owner would be entitled to an 80 per cent return as provided in Section 9(b).

[5] Congressional awareness of the authority to seize stock and bond interests without seizure of the actual instrument is shown by Report No. 273 of the Senate Committee on Finance on H.R. 7201, 70th Cong., 1st Sess., p. 30, which states:

"'Subsection (n) meets the situation which has arisen by reason of the fact that certain corporate interests were seized without obtaining custody of the certificate evidencing those interests. As a result the certificate has been sold in Germany and is being dealt in daily on the German exchanges. Although the committee was convinced that it could not adopt a policy of general recognition of assignments, it seemed imperative that this situation be met. Accordingly, subsection (n) provides for the recognition of the various assignments and for payment to the present owner of the certificate. In order to prevent evasion, however, it is necessary to limit the return, irrespective of the citizenship of the present owner, to the 80 per cent. * * *'"

to frustrate its ultimate aim in enacting the Trading with the Enemy Act: to permit of reduction "to possession by the United States in furtherance of the war effort" of "any property in this country of any alien." *Silesian-American Corp.* v. *Clark,* 332 U.S. 469, 475-476.

It is, of course, true that the property of the alien must be "in this country." *Ibid.* And it is submitted that the court below properly held that that requirement was met in this case. Of course, an intangible obligation to pay, whether evidenced by a bond or negotiable instrument or not, has no "situs" in the sense of location in space. See *First Nat. Bank* v. *Maine,* 284 U.S. 312, 328, 332; Powell, *The Business Situs of Credits,* 28 W. Va. L.Q. 89. What matters for purposes of "jurisdiction", as the decisions of this Court have established, is that the obligor is here and can be made to pay. *Standard Oil Co.* v. *New Jersey,* 341 U.S. 428; *Curry* v. *McCanless,* 307 U.S. 357, 365-367; *State Tax Comm'n* v. *Aldrich,* 316 U.S. 174 (overruling *First Nat. Bank* v. *Maine, supra,* on other grounds). In a real sense, there is property here which can be effectually dealt with when an obligor is here. *Harris* v. *Balk,* 198 U.S. 215, 222-223; *Chicago, Rock Island etc. Ry.* v. *Sturm,* 174 U.S. 710, 715-716. Cf. *Canada Southern Ry. Co.* v. *Gebhard,* 109 U.S. 527. The bond itself would be substantially worthless if the United States would not enforce its recognition by the obligor.[6]

[6] The presence of the obligor has been held a sufficient basis for the attachment of a debt represented by a negotiable

The seizure during time of war of a debt evidenced by a bond not itself taken represents no new policy.[7] It was sanctioned in the days of this country's struggle for independence (See *Ware* v. *Hylton,* 3 Dall. 199, 264-265) as well as by the Confiscation Acts of 1861 and 1862 (Act of August 6, 1861, 12 Stat. 319; Act of July 17, 1862, *idem.* 589). *Miller* v. *United States,* 11 Wall. 268, 296; *Alexandria* v. *Fairfax,* 95 U.S. 774, 779; *Brown* v. *Kennedy,* 15 Wall. 591; see also *Pelham* v. *Way,* 15 Wall. 196, 201-202. It is also the policy of other countries, notably South Africa, Great Britain and

---

instrument not itself seized, although many states have statutes which have been interpreted not to permit an attachment in the case of negotiable instruments because of a policy against subjecting the obligor to the danger of double liability. See the cases noted in 38 C.J.S. § 102 and 71 A.L.R. 581.

Since *Bank of Jasper* v. *First Nat. Bank,* 258 U.S. 112, relied on by petitioners (Pet. 12), concerned the power of a court "to determine the liability of maker to holder" in a case in which neither the holder nor the negotiable instrument was within the court's jurisdiction, it can have no application here. For there has been no attempt in this case to secure a determination that the petitioners, the "maker", are not liable to the holders of the bond instruments. Indeed, it is the petitioners' fear that they remain liable to the "holders" that gives rise to their complaint discussed *infra,* pp. 12-16.

[7] The absence of World War I cases involving domestic bearer bonds located abroad has not been due to any supposed lack of authority with respect to such bonds. At that time, vesting of bonded debts without seizure of the instruments was the exception because of the difficulty of adequate identification. This difficulty, however, has to a large extent been overcome in World War II by the requirement of the Allied occupying powers of the reporting of such property by the enemy. Thus, the enemy ownership and serial numbers of the bonds can be readily established.

Canada. *Randfontein Gold Mining Co.* v. *Custodian of Enemy Property,* [1923] So. Afr. L.R., App. Div. 576; *Sutherland* v. *Administrator of German Property* [1934] Court of Appeal, 103 L.J. (K.B.) 244, [1934] 1 K.B. 423; 50 T.L.R. 107, 150 L.T.R. 247; *Canadian Revised Regulations Respecting Trading with the Enemy* (1943).[8]

The rule that the bond itself is to be treated as the property, and that the "situs" of the obligation is the location of the paper, is admittedly a fiction and a statement of the results courts have reached in other contexts for reasons of policy. See the dissenting opinion of Mr. Justice Stone in *First National Bank* v. *Maine,* 284 U.S. 312, 332, overruled by *State Tax Comm'n* v. *Aldrich,* 316 U. S. 174. The concept of "situs" is not to be employed to thwart the policy of the United States. *United States* v. *Pink,* 315 U.S. 203, 234, 240.

In the analogous situation of the seizure of intangible obligations represented by stock certificates, this Court has upheld the authority of the Custodian to seize though the certificates are be-

[8] The Canadian regulations provide for the vesting of "all enemy property." (Reg. 21(1)). "Property" is defined to include securities (Reg. 1(i)) which in turn are defined to extend to:

"* * * bonds, debentures * * * or other obligations or rights, whether registered or in bearer form * * * and whether the place of registration or the situs of the certificates or other instruments representing the securities is in Canada or not."

Cf. *Bitter* v. *Secretary of State of Canada* (1944) 3 Dom. L.R. 482 (Exch.); *Braun* v. *The Custodian* (1944) 3 Dom. L.R. 412 (Exch.), appeal dismissed, (1944) 4 Dom. L.R. 209 (S. Ct.).

yond his reach. *Silesian-American Corp.* v. *Clark*, 332 U.S. 469; *Great Northern Ry.* v. *Sutherland*, 273 U.S. 182. The same result has been reached even when the certificates are endorsed in blank and hence pass by delivery. *Schrijver* v. *Sutherland*, 19 F. 2d 688 (C.A.D.C.); *B. & O. R. Co.* v. *Sutherland*, 18 F. 2d 560 (C.A. 4).*

Viewed against the decisions under the Act ratifying the seizure of intangibles, the decision below does not reach a novel result and, we submit, calls for no further review.

2. Given a plain Congressional purpose to authorize the Custodian to enforce an obligation of a domestic corporation even though that obligation is evidenced by a negotiable bond which may be held abroad, it is submitted that there is no constitutional obstacle to the enforcement by the Custodian of that obligation.

Congress has done everything within its power

---

* If the Act confers upon the Custodian the authority to vest the obligations in suit, there can be no question of his power to require cancellation of the outstanding bonds and the issuance of new ones. *Silesian-American Corp.* v. *Clark*, 332 U.S. 469. Nor can the provisions of the indentures under which the bonds were issued or those of the Negotiable Instruments Law justify the failure to comply with that requirement. "Federal officers and Federal courts are not dependent upon State legislation for power to lay hold of property." *Miller* v. *United States*, 11 Wall. 268, 297; *Columbia Brewing Co.* v. *Miller*, 281 Fed. 289, 291 (C.A. 5). Any inconsistent provision of state law, such as the Negotiable Instruments Law or the Stock Transfer Act, must yield. *Silesian-American Corp.* v. *Clark*, *supra*; *Gt. Northern Ry.* v. *Sutherland*, 273 U.S. 182; *Central Hanover Bk. & Trust Co.* v. *Markham*, 68 F. Supp. 829, 831-832 (S.D.N.Y.).

to immunize petitioners from the risk of being held liable a second time. Sections 5(b)(2) and 7(e) of the Trading with the Enemy Act exonerate from liability any person turning over property or otherwise acting in compliance with any requirement made pursuant to the Act. Under such circumstances, it is submitted that enforcement of petitioners' obligations is not to be frustrated by their fears that a foreign court may deny effect to these exculpatory provisions.[10]

The very reach of petitioners' constitutional argument suggests its infirmity. For possibilities of double liability such as petitioners envisage are not peculiar to cases, like this, involving a negotiable instrument possibly held abroad. No reason is apparent why such possibilities could not be tendered as reason for holding the Trading with the Enemy Act invalid in every instance in which suit is brought to compel a bailee, trustee, agent or obligor to comply with a vesting order, if the defendant or his property might come within the jurisdiction of a foreign court. If an assurance of non-liability abroad—an assurance Congress cannot grant—were essential to the validity of seizures under the Act, one would suppose that in the course of the long history of alien property

[10] There is no question but that these provisions adequately protect the petitioners against suit in any court of the United States by a holder of these bonds. *Silesian-American Corp.* v. *Clark*, 332 U.S. 469; *Gt. Northern Ry.* v. *Sutherland*, 273 U.S. 182; *American Exch. Natl. Bank* v. *Garvan*, 273 Fed. 43, 47 (C.A. 2), affirmed *sub nom. Simon* v. *American Exch. Nat. Bank*, 260 U.S. 706.

seizures, that point would have been made and Congress put to the choice of providing recourse for one who might twice be held liable or foregoing seizures as a weapon of economic warfare.

The Constitution forced no such choice upon the Congress. This Court has held, in very similar circumstances, that whether provision should be made for relief against foreign liability is a question for decision by Congress, and that the absence of such provision is no bar to enforcement of a federal statute. In *Railroad Co.* v. *Collector,* 100 U.S. 595, an early form of "withholding tax" on interest or dividends was upheld against the objection that the company might not be protected abroad. The Court, in an opinion by Mr. Justice Miller, said (100 U.S. at 598-599):

> Whether, as a question of international law, this declaration would relieve the corporation from the obligation to pay its foreign bondholder the full sum for which it contracted, we need not discuss; for this court, on all such subjects, is bound by the legislative and political departments of its own government. * * * being lawfully assessed and paid, it cannot be recovered back by reason of any inefficiency or ethical objection to the remedy over against the bondholder.

The fact that, following World War I, suits by former enemy nationals in the courts of their own country or elsewhere for seizures by the Custodian were outlawed by the Treaty of Berlin,[11]

[11] 42 Stat. 1939, 1948. See *United States* v. *Chemical Foundation,* 272 U.S. 1, 11; *Klein* v. *Palmer,* 18 F. 2d 932 (C.A. 2).

tends to confirm this Court's apparent belief, expressed in *Railroad Co.* v. *Collector, supra,* that the problem of potential foreign liability should be resolved in the diplomatic sphere and not in terms of constitutional law. This view would seem to be implicit also in Section 40 of the Trading with the Enemy Act (Act of Sept. 28, 1950, c. 1094, 64 Stat. 1079, 50 U. S. C. App., Supp. IV, 40 *infra,* p. 21), which authorizes the negotiation of agreements to settle "intercustodial conflicts" concerning enemy property. The Brussels Agreement, to which the United States and five other countries are parties and the signing of which was authorized by Section 40, attempts to resolve such questions as may arise when, for example, the United States vests the obligation evidenced by a bond of American issue and France seizes the bond itself. Article 1 of the Annex to the Agreement relates to securities, including bonds, and provides that the country in which the security was issued shall be entitled to retain the underlying obligation as against the country in which the paper is located.[12]

It should be noted, moreover, that the foreign liability of the petitioners is hypothetical and may never materialize. The bonds in question are payable in the United States (see p. 2 of each indenture), and foreign courts may hold that the bonds were intended to be governed by our law. See the

[12] The text of the Agreement is set forth in State Dept. Bull., Jan. 4, 1948, Vol. 18, No. 444, p. 6; Article I of the Annex appears on page 7. For announcement of the going into effect of the Agreement, see State Dept. Bull., Feb. 19, 1951, Vol. 24, No. 607, p. 293.

foreign "gold clause" decisons discussed in *Compania de Inver. Int.* v. *Industrial Mtge. Bank*, 269 N.Y. 22, 198 N.E. 617; to the same effect, *Hartmann* v. *United States*, 106 Ct. Cl. 686, 65 F. Supp. 397, certiorari denied, 330 U.S. 842. The courts of the United States, at least, have regarded it as a well-settled rule of international law that the courts of one country will not sit in judgment on the acts of the government of another done within its own territory (*Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 303-304; *United States* v. *Pink*, 315 U.S. 203, 233; *Bernstein* v. *Van Heyghen Freres*, 163 F. 2d 246 (C.A. 2), certiorari denied, 332 U.S. 772), and have applied that rule in cases of foreign reorganizations of corporations (*Canada Southern Ry. Co.* v. *Gebhard*, 109 U.S. 527, 536) and foreign seizures under a statute equivalent to the Trading with the Enemy Act. *Disconto-Gesellschaft* v. *United States Steel Corporation*, 300 Fed. 741 (S.D.N.Y.), affirmed, 267 U.S. 22.

Thus it appears not only that petitioners have, as yet, not been subjected to a second liability abroad but that they may never be. If there is no second liability, the question of what remedies are available if such is imposed is not presented for decision.[13]

---

[13] In their statement of the questions presented (Pet. 5-6), petitioners suggest that the vesting of foreign held bonds may deprive a non-enemy bondholder of his property without notice or opportunity to be heard. Whatever rights the bondholder may have, clearly petitioners have no standing vicariously to assert them. *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, 474.

## CONCLUSION

The court below correctly reversed the decision of the district court denying the Custodian the relief sought. There is no conflict of decisions. The petition should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
*Solicitor General.*
HAROLD I. BAYNTON,
*Assistant Attorney General.*
STANLEY M. SILVERBERG,
*Special Assistant to*
*the Attorney General.*
GEORGE B. SEARLS,
IRWIN A. SEIBEL,
*Attorneys.*

OCTOBER 1951.

# APPENDIX

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U.S.C. App. 1, *et seq.*:

SEC. 7.

(a) * * *

Any person in the United States who holds or has or shall hold or have custody or control of any property beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or ally of enemy, or of any person whom he may have reasonable cause to believe to be an enemy or ally of enemy and any person in the United States who is or shall be indebted in any way to an enemy or ally of enemy, or to any person whom he may have reasonable cause to believe to be an enemy or ally of enemy, shall, with such exceptions and under such rules and regulations as the President shall prescribe, and within thirty days after the passage of this Act, or within thirty days after such property shall come within his custody or control, or after such debt shall become due, report the fact to the Alien Property Custodian by written statement under oath containing such particulars as said custodian shall require. * * *

(b) Nothing in this Act contained shall render valid or legal, or be construed to recognize as valid or legal, any act or transaction constituting trade with, to, from, for or on account of, or on behalf or for the benefit of an enemy performed or engaged in since the beginning of the war and prior to the passage of this Act or any such act or transaction hereafter performed or en-

gaged in except as authorized hereunder, which would otherwise have been or be void, illegal, or invalid at law. No conveyance, transfer, delivery, payment, or loan of money or other property, in violation of section three hereof, made after the passage of this Act and not under license as herein provided shall confer or create any right or remedy in respect thereof; and no person shall by virtue of any assignment, indorsement, or delivery to him of any debt, bill, note, or other obligation or chose in action by, from, or on behalf of, or on account of, or for the benefit of an enemy or ally of enemy have any right or remedy against the debtor, obligor, or other person liable to pay, fulfill, or perform the same unless said assignment, indorsement, or delivery was made prior to the beginning of the war or shall be made under license as herein provided, or unless, if made after the beginning of the war and prior to the date of passage of this Act, the person to whom the same was made shall prove lack of knowledge and of reasonable cause to believe on his part that the same was made by, from or on behalf of, or on account of, or for the benefit of an enemy or ally of enemy; and any person who knowingly pays, discharges, or satisfies any such debt, note, bill, or other obligation or chose in action shall, on conviction thereof, be deemed to violate section three hereof. * * *

* * * * * *

(e) No person shall be held liable in any court for or in respect to anything done or

omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.

Any payment, conveyance, transfer, assignment, or delivery of money or property made to the Alien Property Custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. The Alien Property Custodian and such other persons as the President may appoint shall have power to execute, acknowledge, and deliver any such instrument or instruments as may be necessary or proper to evidence upon the record or otherwise such aquittance and discharge, and shall, in case of payment to the Alien Property Custodian of any debt or obligation owed to an enemy or ally of enemy, deliver up any notes, bonds, or other evidences of indebtedness or obligation, or any security therefor in which such enemy or ally of enemy had any right or interest that may have come into the possession of the Alien Property Custodian, with like effect as if he or they, respectively, were duly appointed by the enemy or ally of enemy, creditor, or obligee.

SEC. 9.

* * * * *

(n) In the case of property consisting of stock or other interest in any corporation, association, company, or trust, or of bonded or other indebtedness thereof, evidenced by certificates of stock or by bonds or by other certificates of interest therein or indebtedness thereof, or consisting of dividends or

interest or other accruals thereon, where the right, title, and interest in the property (but not the actual certificate or bond or other certificate of interest or indebtedness) was conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or seized by him, if the President determines that the owner thereof or of any interest therein has acquired such ownership by assignment, transfer, or sale of such certificate or bond or other certificate of interest or indebtedness, (it being the intent of this subsection that such assignment, transfer, or sale shall not be deemed invalid hereunder by reason of such conveyance, transfer, assignment, delivery, or payment to the Alien Property Custodian or seizure by him) and that the written consent provided for in subsection (m) has been filed, then the President may make in respect of such property an order of the same character, upon the same conditions, and with the same effect, as in cases provided for in subsection (b), including the benefits of subsection (c).

SEC. 40 [50 U. S. C. App., Supp IV, 40]. The President, or such officer or agency as he may designate, is authorized to conclude and give effect to agreements to further the amicable and expeditious settlement of intercustodial conflicts involving enemy property * * *

☆ U. S. Government Printing Office, 1951 J960697/280

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
DEC 29 1951

No. 305

# In the Supreme Court of the United States

OCTOBER TERM, 1951

CITIES SERVICE COMPANY AND THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, *Petitioners*

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

## BRIEF FOR THE RESPONDENT

# INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statutes and Executive Orders Involved | 2 |
| Statement | 3 |
| Summary of Argument | 5 |
| Argument: | |
| I. The Trading With the Enemy Act authorized the Custodian to vest and enforce the debts in suit, notwithstanding that they were evidenced by negotiable bearer bonds not themselves seized | 9 |
| II. The Application of the Act to Bearer Bonds Raises No Constitutional Question | 27 |
| A. Petitioners have no standing to complain of any injury to the bondholders | 28 |
| B. The United States is not required to protect petitioners against possible imposition of liability abroad | 30 |
| 1. The Trading With the Enemy Act exonerates petitioners from liability to the fullest extent necessary | 32 |
| 2. Any injury that petitioners may suffer is consequential and conjectural, for which Congress is under no obligation to provide a remedy | 36 |
| 3. The decision is for Congress whether petitioners should be reimbursed for a liability abroad | 44 |
| Conclusion | 50 |
| Appendix | 51 |


## CITATIONS


CASES:

*Alexandria* v. *Fairfax*, 95 U. S. 774 ..... 21

*American Exch. Nat. Bank* v. *Garvan*, 273 Fed. 43, affirmed sub nom, *Simon* v. *American Exchange Nat. Bank*, 260 U. S. 706 ..10, 33

*Anderson* v. *Transandine Handelmaatschappij*, 289 N. Y. 9, 43 N. E. 2d 502 ..... 40

*Anderson Nat. Bank* v. *Luckett*, 321 U. S. 233 ..... 43

| | Page |
|---|---|
| *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288 | 31 |
| *Baldwin* v. *Hale*, 1 Wall. 223 | 43 |
| *Bank of Jasper* v. *First Nat. Bank*, 258 U. S. 112 | 19 |
| *Becker Co.* v. *Cummings*, 296 U. S. 74 | 34 |
| *Bedford* v. *United States*, 192 U. S. 217 | 42 |
| *Blagge* v. *Balch*, 162 U. S. 439 | 45 |
| *B. & O. Ry.* v. *Sutherland*, 18 F. 2d 560 | 22 |
| *Brown* v. *Kennedy*, 15 Wall. 591 | 21 |
| *Canada Southern Ry. Co.* v. *Gebhard*, 109 U. S. 527 | 19, 43 |
| *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553 | 30 |
| *Central Hanover Bk. & Trust Co.* v. *Markham*, 68 F. Supp. 829 | 23 |
| *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103 | 46 |
| *Chicago, Rock Island etc. Ry.* v. *Sturm*, 174 U. S. 710 | 19 |
| *Clark* v. *Allen*, 331 U. S. 503 | 17 |
| *Clark* v. *Uebersee Finanz-Korp., A. G.*, 332 U. S. 480 | 9, 34 |
| *Clark* v. *Willard*, 294 U. S. 211 | 46 |
| *Collett, Ex Parte*, 337 U. S. 55 | 11 |
| *Columbia Brewing Co.* v. *Miller*, 281 Fed. 289 | 23 |
| *Commercial Trust Co.* v. *Miller*, 262 U. S. 51 | 37 |
| *Compania de Inversiones Int.* v. *Industrial Mortgage Bank*, 269 N. Y. 22, 198 N. E. 617 | 39 |
| *Cummings* v. *Deutsche Bank*, 300 U. S. 115 | 36 |
| *Curry* v. *McCanless*, 307 U. S. 357 | 19 |
| *Danforth* v. *United States*, 308 U. S. 271 | 42 |
| *Deutsche Australische, etc.* v. *United States*, 59 Ct. Cl. 450, cert. den. 277 U. S. 610 | 37 |
| *Disconto-Gesellschaft* v. *Umbreit*, 208 U. S. 570 | 46 |
| *Duisberg* v. *United States*, 116 Ct. Cl. 861, 89 F. Supp. 344, cert. den. 340 U. S. 890 | 34 |
| *Elgart* v. *Mintz*, 123 N. J. Eq. 404, 197 Atl. 747 | 23 |
| *First Nat. Bank* v. *Maine*, 284 U. S. 312 | 19, 24 |
| *Garvan* v. *Marconi Wireless Telegraph Co.*, 275 Fed. 486 | 18 |
| *Gibbs & Sons* v. *Societe Industrielle, et Commerciales Mextaux L. R.*, 25 Q. B. D. 399 | 43 |
| *Great Northern Ry. Co.* v. *Sutherland*, 273 U. S. 182 | 18, 22, 23, 24, 25, 33, 35 |
| *Green* v. *United States*, 10 Ct. Cl. 466 | 46 |
| *Guaranty Trust Co.* v. *Fentress*, 61 F. 2d 329 | 23 |
| *Harris* v. *Balk*, 198 U. S. 215 | 19 |
| *Hijo* v. *United States*, 194 U. S. 315 | 36 |
| *Horstmann* v. *United States*, 257 U. S. 138 | 41 |
| *Ingenohl* v. *Olsen & Co.*, 273 U. S. 541 | 35 |
| *Iron City Savings Bank* v. *Isaacsen*, 158 Va. 609, 164 S. E. 520 | 23 |
| *Kahn* v. *Garvan*, 263 Fed. 909 | 36 |
| *Klein* v. *Palmer*, 18 F. 2d 932 | 48 |

Page

*Klein* v. *Wilson & Co., Inc.*, 7 F. 2d 769, aff'd 7 F. 2d 777 ..... 23
*Kohn* v. *Jacob & Josef Kohn*, 264 Fed. 253 ..... 10
*Legal Tender Cases*, 12 Wall. 457 ..... 42
*Lorentzen* v. *Lydden & Co.*, [1942] 2 KB 202 ..... 40
*Markham* v. *Cabell*, 326 U. S. 404 ..... 9, 10
*McGrath* v. *Manufacturers Trust Co.*, 338 U. S. 241 ..... 10
*Miller Application of*, 288 Fed. 760 ..... 12
*Miller* v. *Rouse*, 276 Fed. 715 ..... 10
*Miller* v. *United States*, 11 Wall. 268 ..... 21, 23
*Mitchell* v. *United States*, 267 U. S. 341 ..... 41
*Morrisdale Coal Co.* v. *United States*, 259 U. S. 188 ..... 41
*Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306 ..... 29
*Mullen Beney. Corp.* v. *United States*, 290 U. S. 89 ..... 42
*Munich Reinsurance Co.* v. *First Reinsurance Co.*, 6 F. 2d 742 ..... 48
*Mutzenbecher* v. *Ballard*, 16 F. 2d 173, affirmed, 16 F. 2d 174 ..... 10
*Norman* v. *B. & O. R. Co.*, 294 U. S. 240 ..... 29, 37
*Ogden* v. *Folliott*, 3 T. R. 726, 100 Eng. Rep. 825 ..... 40
*Omnia Co.* v. *United States*, 261 U. S. 502 ..... 41
*Opp Cotton Mills* v. *Administrator*, 312 U. S. 126 ..... 50
*Pelham* v. *Way*, 15 Wall. 196 ..... 21
*Pflueger* v. *United States*, 73 App. D. C. 364, 121 F. 732, certiorari denied, 314 U. S. 617 ..... 34
*Propper* v. *Clark*, 337 U. S. 472 ..... 10, 24
*Railroad Co.* v. *Collector*, 100 U. S. 595 ..... 44, 45
*Randfontein Gold Mining Co.* v. *Custodian of Enemy Property* [1923] So. Afr. L. R., App. Div. 576 ..... 21
*Rumely* v. *United States*, 293 Fed. 532, certiorari denied, 263 U. S. 713 ..... 10
*Salamandra Ins. Co.* v. *N. Y. Life Ins. & Trust Co.*, 254 Fed. 852 ..... 25
*Sanguinetti* v. *United States*, 264 U. S. 146 ..... 41
*Schrijver* v. *Sutherland*, 19 F. 2d 688 ..... 22
*Security Bank* v. *California*, 263 U. S. 282 ..... 28, 37, 43
*Shapleigh* v. *Mier*, 299 U. S. 468 ..... 45
*Silesian-American Corp.* v. *Clark*, 332 U. S. 469 ..... 9, 12, 18, 19, 22, 23 24, 28, 31, 33, 35
*Silesian-American Corp.* v. *Markham*, 156 F. 2d 793, affirmed, 332 U. S. 469 ..... 18
*Standard Oil Co.* v. *New Jersey*, 341 U. S. 428 ..... 19, 43
*State of the Netherlands* v. *Federal Reserve Bank*, 99 F. Supp. 655 ..... 39
*State Tax Comm'n* v. *Aldrich*, 316 U. S. 174 ..... 19, 24
*Stern* v. *Newton*, 180 Misc. 241, 39 N. Y. S. 2d 1593 ..... 28
*Stoehr* v. *Wallace* 255 U. S. 239 ..... 28, 34
*Submarine Signal Co.* v. *United States*, 61 Ct. Cl. 652, certiorari denied, 273 U. S. 713 ..... 46

Page

*Sutherland* v. *Administrator of German Property* [1943] Ct. of Appeal, 103 L. J. (K. B.) 244 ..... 21
*Tyler* v. *Court of Registration*, 175 Mass. 71 55 N. E. 812, writ of error dismissed, 179 U. S. 405 ..... 29
*Underhill* v. *Hernandez*, 168 U. S. 250 ..... 45
*United States* v. *Bush & Co.*, 310 U. S. 371 ..... 18
*United States* v. *Chemical Foundation*, 272 U. S. 1 ..... 24, 48
*United States* v. *Curtiss Wright Corp.*, 299 U. S. 304 ..... 46
*United States* v. *Erie Railway Company*, 106 U. S. 327 ..... 45
*United States* v. *Leiner*, 143 F. 2d 298 ..... 14
*United States* v. *Pink*, 315 U. S. 203 ..... 24
*Ware* v. *Hylton*, 3 Dall. 199 ..... 21
*Williamsburgh Sav. Bank* v. *Town of Solon*, 136 N. Y. 465, 32 N. E. 1058 ..... 25
*Wolff* v. *Oxholm*, 6 M. & S. 92, 105 Eng. Rep. 1177 ..... 40

STATUTES AND TREATIES:

Deficiency Appropriation Act of Nov. 4, 1918, 40 Stat. 1020, 50 U. S. C. App. 7(c) ..... 18
Economic Cooperation Act of 1948, Sec. 111(b), 62 Stat. 143, as amended, 64 Stat. 198, 22 U. S. C., Supp. IV, 1509(b) ..... 46
Emergency Banking Act of March 9, 1933, 48 Stat. 1 ..... 13
First War Powers Act, Title III, 1941, 55 Stat. 839, 50 U. S. C. App. 616 ..... 6, 9, 17, 52
Joint Resolution of May 7, 1940, 54 Stat. 179 ..... 14, 16, 51
Trading with the Enemy Act, 40 Stat. 411, as amended 50 U. S. C. App.:
  Section 2 ..... 35
  Section 5(b) ..... 6, 9, 17, 20, 27, 52
  Section 5(b)2 ..... 33
  Section 7 ..... 10
  Section 7(a) ..... 10, 54
  Section 7(b) ..... 10, 55
  Section 7(c) ..... 6, 9, 10, 11, 34, 56
  Section 7(e) ..... 11, 18, 33, 57
  Section 9 ..... 29
  Section 9(a) ..... 28, 34, 35
  Section 9(f) ..... 34
  Section 9(n) ..... 12, 18, 20, 58
  Section 12 ..... 18
  Section 32 ..... 29
  Section 33 ..... 28
  Section 40 ..... 46, 59
Uniform Stock Transfer Act, 6 U. L. A. ..... 23
Treaty of Berlin, 42 Stat. 1939 ..... 48
Treaty with Bulgaria, 61 Stat. (Part 2) 1953 ..... 48
Treaty with Hungary, 61 Stat. (Part 2) 2109 ..... 48
Treaty with Italy, 61 Stat. (Part 2) 1369 ..... 48

Page

Treaty with Japan, unratified, Department of State Bull., Vol. XXV, Aug. 27, 1951, p. 349 ..... 48
Treaty with Roumania, 61 Stat. (Part 2) 1799 ..... 48
EXECUTIVE ORDERS:
2729-A, Oct. 12, 1917, Meares, *The Trading with the Enemy Act*, pp. 559, 566 ..... 10
2813, Feb. 26, 1918, Meares, *The Trading with the Enemy Act*, p. 584 ..... 10
3016, Dec. 3, 1918, Meares, *The Trading with the Enemy Act*, p. 617 ..... 10
6694, May 1, 1934, 28 C. F. R. (1st ed. 1939), § 4.1 ..... 10
8136, May 15, 1939, 4 F. R. 2044 ..... 10
8389, April 10, 1940, 5 F. R. 1400 ..... 13, 14, 16
8785, June 14, 1941, 6 F. R. 2897 ..... 14
9095, March 11, 1942, 7 F. R. 1971, amended by E. O. 9193, July 6, 1942, 7 F. R. 5205, and E. O. 9567, June 8, 1945, 10 F. R. 6917 ..... 9, 59
9142, April 21, 1942, 7 F. R. 2985 ..... 10
9193, July 6, 1942, 7 F. R. 5205 ..... 20
9788, Oct. 14, 1946, 11 F. R. 11981 ..... 3, 10
MISCELLANEOUS:
71 A. L. R. 581 ..... 19
Alk and Moskovitz, *Removal of United States Controls Over Foreign-Owned Property*, 10 Fed. Bar Journal 3 ..... 25
Beale, *The Conflict of Laws* (1935) §§ 108.1-108.4 ..... 43
Berger & Bittker, *Freezing Controls: The Effects of an Unlicensed Transaction*, 47 Col. L. Rev. 398 ..... 14
Borchard, *Diplomatic Protection of Citizens Abroad* (1927) ..45, 46
Brussels Agreement, *State Dept. Bulletin*, Jan. 4, 1948, Vol. 18, No. 444, P. 6; *idem.* Feb. 19, 1951, Vol. 24, No. 607, p. 293 ..40, 47
Canadian Revised Regulations Respecting Trading with the Enemy (1943)
8 C. F. R. Sec. 504.1 ..... 21
31 C. F. R. 1943 Cum. Supp. § 130 ..... 12
38 C. J. S. § 102 ..... 16
55 Cong. Rec. 4844 ..... 19
55 Cong. Rec. 4864 ..... 11
55 Cong. Rec. 4972 ..... 11
86 Cong. Rec. 5006-08 ..... 11
86 Cong. Rec. 5169-71 ..... 14
86 Cong. Rec. 5168-83 ..... 16
86 Cong. Rec. 5178 ..... 14
86 Cong. Rec. 5179 ..... 15
Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws*, 56 Harv. L. Rev. 30 (1942) ..... 14, 16
General Ruling No. 5B, January 20, 1951, 16 F. R. 539 ..... 40
Hackworth, *Digest of International Law* (1941), II, p. 71 .... 26, 46

Page

*Hearings on H. R. 4704, H. Committee on Interstate and Foreign Commerce*, 65th Cong., 1st Sess., p. 42 ..... 32, 47
House Report No. 17, 70th Cong., 1st Sess., p. 21 ..... 13
*Inter-Allied Declaration Regarding Forced Transfers of Property in Enemy Controlled Territory of January 5, 1943*, Dept. of State Bulletin, Vol. VIII, No. 185, p. 21 ..... 25
Law No. 63 of the Allied High Commission, Official Gazette of the Allied High Commission for Germany, No. 64, Sept. 5, 1951 ..... 48
Moore, *A Digest of International Law* (1906), VI, pp. 249, 696 .. 46
Powell, *The Business Situs of Credits*, 28 W. Va. L. Q. 89 ..... 19
Press Release, Dept. of Justice, Jan. 19, 1951 ..... 26, 62
Press Release, Dept. of Justice, Oct. 4, 1951 ..... 27, 66
Proclamation 2487, May 27, 1941, 6 F. R. 2617 ..... 14
Rabel, *Situs Problems in Enemy Property Measures*, 11 Law. & Contemp. Prob. 118 (1945) ..... 40
Regulations, Foreign Funds Controls, Treasury Department, 31 C. F. R., 1943, Cum. Supp.:
Sec. 130 .....
130.2(c) ..... 16
130.4(a) ..... 16
130, App. B. Pub. Cir. No. 4, Sec. III, Class B(7) ..... 17
Regulations, Office of Alien Property, 8 C. F. R. Sec. 504.1 .... 17
*Resolution No. VI of the United Nations Monetary and Financial Conference at Bretton Woods, July 1-22, 1944*, Dept. of State Bulletin, Vol. XI, No. 276, p. 384 .....
S. Rept. No. 273, 70th Cong., 1st Sess., p. 30 ..... 25
S. Rept. No. 1496, 76th Cong., 3d Sess. ..... 13
Vesting Order, 12960, 14 F. R. 1405 ..... 14
Vesting Orders, 18519-18521, 16 F. R. 10097-10102 ..... 8
26

# In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 305

CITIES SERVICE COMPANY AND THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, *Petitioners*

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

## BRIEF FOR THE RESPONDENT

### OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 43) is reported at 93 F. Supp. 408. The opinion of the

United States Court of Appeals for the Second Circuit (R. 55) is reported at 189 F. 2d 744.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1951 (R. 62). The petition for a writ of certiorari was filed on September 8, 1951, and was granted on November 5, 1951 (R. 63). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether the provisions of the Trading with the Enemy Act which authorize the vesting of "any property or interest", including "choses in action and rights and claims of every character and description", confer the right to seize and enforce an obligation of a domestic corporation evidenced by a negotiable bearer bond not itself seized.

2. Where the Custodian has vested an obligation determined to be enemy owned, is it necessary to the constitutional validity of the Custodian's action that there be certainly available a remedy to protect the American obligor from the consequence of a foreign court's possible refusal to recognize the vesting.

## STATUTES AND EXECUTIVE ORDERS INVOLVED

The pertinent provisions of the Trading with the Enemy Act, as amended, of Executive Order No. 9193 issued thereunder, and of other pertinent material, are set forth in the Appendix, *infra*, pp. 51-68.

## STATEMENT

On March 11, 1949, the respondent, as successor to the Alien Property Custodian,[1] issued Vesting Order No. 12960, 14 F. R. 1405 (R. 8-10). By that order, he vested in himself the debts or obligations evidenced by three Cities Service Company 5% Gold Debenture Bearer Bonds of $1,000 face value each, upon findings that the obligations were owned by, or owing to, a named resident of Germany and national of a designated enemy country. The order further identified the bonds as bearing serial numbers M 23293, M 23318, and M 7029 (R. 8-9). A copy of the order was served on the Company (R. 11) and, by subsequent letters, the Company was directed to cancel two of the bonds which had been called for redemption, and to issue in lieu thereof its check representing the proceeds of redemption with accrued interest. The Company was also directed to cancel the third bond and to issue in lieu thereof a new bond and to have affixed thereto the number of coupons which had not been presented for payment. (R. 13-20.)

One of the bonds (M 23293) had been paid prior to the issuance of the vesting order, and, with respect to this one, the Custodian withdrew his claim

[1] By Executive Order No. 9788 (11 F. R. 11981, October 14, 1946), the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this brief, the term "Custodian" will be used, as the context may require, to refer either to the Alien Property Custodian or to the Attorney General as his successor.

(R. 32). Neither of the two bonds remaining in issue is in the possession or control of the Custodian. One (M 7029), which was presented for redemption in 1950 and bears a legend of the Custodian's action, is apparently in possession of Dominick & Dominick, a brokerage firm in New York City. The other (M 23318), which was called for redemption in 1947 (R. 15, 25-26, 30), is presently overdue, having matured in 1950. (R. 4, 15.) The present location of this bond is unknown. The bonds were reported to have been in Berlin prior to the issuance of the vesting order. (R. 32-33.)

The Chase National Bank of the City of New York is trustee and paying agent under the indentures under which the bonds were issued (R. 25). Upon the Company's failure to comply with the Custodian's demand, the Custodian instituted the present action under Section 17 of the Trading with the Enemy Act (40 Stat. 425, 50 U. S. C. App. 17), in which the Bank was joined as defendant, seeking payment of the obligations or the issuance of new bonds (R. 3-7). Each party moved for summary judgment (R. 37, 39, 41). The District Court held that the location of the bonds outside the United States placed the obligations they represented beyond the reach of the Custodian's authority, on the ground that the obligations have no existence apart from the bonds (R. 47-48). Accordingly, it granted the petitioners' motions for summary judgment (R. 49-50).

The Court of Appeals reversed and directed summary judgment for the respondent (R. 62). The court held that the Trading with the Enemy Act authorized the seizure and enforcement of obligations of an American debtor evidenced "by bonds outside the country, as well as any of other alien held choses in action" (R. 58). It further held that the power of the United States to do so is not affected by the physical location outside the United States of the bond, so long as the obligor is present in this country. The Court of Appeals also indicated that the petitioners will have a claim against the Government in the event that a foreign court refuses to recognize payment to the respondent as a defense and enters judgment against them in a suit by the bondholder. The court assumed "for argument that, if it were true that [petitioners] remain exposed to such a recovery, and will have no consequent claim against the Treasury for recoupment, a judgment against them will 'take' their property without compensation in violation of the Fifth Amendment" (R. 59). Since the court was satisfied that petitioners would have a claim, it did not reach the constitutional question which it assumed the absence of a claim would raise.

## SUMMARY OF ARGUMENT

### I

The authority to vest obligations evidenced by domestic bearer bonds appears in the explicit pro-

visions of Section 7(c) enacted in World War I and in the broad grant of power conferred by the World War II amendment of Section 5(b). Section 7(c) confers authority to seize all enemy property, "including * * * choses in action, and rights and claims of every character and description." Section 5 (b), as amended in 1941, authorizes the vesting of "any [foreign] property or interest." The authority to reach bonded indebtedness, even when the bond itself was not seized, was explicitly reaffirmed by Section 9 (n), added to the Act in 1928.

The legislative history of the Act confirms this interpretation of the statutory language. When Congress amended Section 5 (b) in 1940 to authorize the President to prevent transactions in "evidences of indebtedness or evidences of ownership" of property, it also ratified regulations which explicitly covered bearer bonds issued by United States corporations. And when in December, 1941, Section 5 (b) was again amended to authorize the President to vest foreign property, that authority covered the same types of property previously subjected to "freezing" controls.

The seizure during time of war of an obligation evidenced by a bond not itself taken has been sanctioned under confiscation statutes in the early days of the Republic and in the period of the Civil War. Other countries have also permitted the seizure of obligations represented by bearer bonds. Just as

in the case of shares of stock, the mercantile usage and the legal fiction of identifying the obligation with the paper should not be permitted to restrict the exercise of the war powers of the United States. To exempt obligations represented by bonds from the Act's application would do more than provide a sanctuary for enemy investments; it would also defeat the government's recently strengthened program of assisting in the recovery of American securities looted by the Axis during the war.

## II

Petitioners have no standing to complain of any injury to their bondholders. In any event, the Act affords adequate remedies to nonenemies whose property is vested and notice by publication of the vesting was sufficient under the circumstances. The Court of Appeals dealt with petitioners' contention that compliance with the Custodian's order might subject them to a second liability in a foreign court by saying that should such a second liability occur petitioners would have the right to just compensation. Since any such second liability is at present conjectural, this Court may feel it unnecessary to decide whether a right to just compensation would be implied in such circumstances. If the question is reached, we submit that there is no necessity to imply a just compensation remedy. The Act expressly exonerates petitioners from liability and that exoneration will have unquestioned

effectiveness within the United States. Congress in 1917 deliberately decided not to attempt to relieve from possible liability abroad persons required to comply with the Custodian's vesting orders. Whether petitioners will be subjected to a second liability abroad is conjectural and there is good reason to believe that at least in the former enemy countries and many of the most important allies of the United States no such liability will arise. In any event, whatever loss petitioners might suffer abroad would be in the nature of consequential damages for which the United States is not obligated to afford a remedy, since it will result directly from the action of a foreign government and only indirectly from that of the United States. The obligation of the United States to protect the property of its citizens abroad is a political one, not cognizable by the courts, and the decision whether to provide other relief is for Congress. Traditionally, post-war claims resulting from wartime seizures have been dealt with in the sphere of diplomacy. The Brussels Agreement, effective in February, 1951, expressly provides that bearer bonds of American issue found in the territory of any of the other signatory nations shall be handed over to the United States.

## ARGUMENT

### I

**The Trading With the Enemy Act Authorized the Custodian to Vest and Enforce the Debts in Suit, Notwithstanding That They Are Evidenced by Negotiable Bearer Bonds Not Themselves Seized.**

Section 7(c) of the Trading with the Enemy Act, as it was fashioned during World War I, empowers the President to seize the following enemy interests: "any money or other property, including * * * choses in action, and rights and claims of every character and description." 40 Stat. 411, 418, as amended, 40 Stat. 1020, 50 U. S. C. App. 7(c), Appendix, p. 56. By the World War II amendment to Section 5(b), Congress added the authority to vest "any property or interest of any foreign country or national thereof." Title III of the First War Powers Act, 1941, 55 Stat. 839, 50 U. S. C. App. 616, Appendix, p. 53. The effect of this amendment was to broaden the Section 7(c) powers which the outbreak of World War II had revitalized.[1] See *Markham* v. *Cabell*, 326 U. S. 404; *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 479; *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480, 485-486, 488.[2]

---

[2] The authority under Section 5(b) is delegated to the Custodian by Executive Order No. 9095, March 11, 1942, 7 F. R. 1971, as amended by Executive Order No. 9193, July 6, 1942, 7 F. R. 5205, and Executive Order No. 9567, June 8, 1945, 10 F. R. 6917. See particularly Section 12 thereof. Appendix, pp. 61-62.

By a series of Executive Orders, the powers granted by Section 7(c) have been delegated to the present Custodian.

Unquestionably, the Act authorizes the seizure of "debts." *McGrath* v. *Manufacturers Trust Co.*, 338 U. S. 241, 246; *Propper* v. *Clark*, 337 U. S. 472.[3] And the comprehensive statutory language and the scheme of Section 7 leave no doubt of a legislative purpose to include all debts, however evidenced. Thus, Section 7(a) (Appendix, *infra*, p. 54) requires any person "indebted in any way" to an enemy to report the fact to the Custodian. Section 7(b) (Appendix, *infra*, p. 55), which was aimed at transfers to neutrals by enemy obligees, declares that the transferee shall have no right or remedy against the obligor by virtue "of any assignment, indorsement, or delivery to him of any debt, bill, note, or other obligation or chose in action by * * *

---

Executive Orders No. 2729-A, October 12, 1917, set out in Meares, *The Trading with the Enemy Act*, pp. 559, 566; No. 2813, February 26, 1918, *id.* p. 584; No. 3016, December 3, 1918, *id.* p. 617; No. 6694, May 1, 1934, 28 C. F. R. (1st ed. 1939) § 4.1; No. 8136, May 15, 1939, 4 F. R. 2044; No. 9142, April 21, 1942, 7 F. R. 2985; No. 9788, October 14, 1946, 11 F. R. 11981.

Section 7(c) is obviously one of the "permanent" sections of the Act. Accordingly, the present Custodian is entitled to the full scope of the powers granted thereby. *Markham* v. *Cabell*, 326 U. S. 404, 423-424 (concurring opinion).

[3] To the same effect: *Mutzenbecher* v. *Ballard*, 16 F. 2d 173 (S. D. N. Y.), affirmed, 16 F. 2d 174 (C. A. 2); *Rumely* v. *United States*, 293 Fed. 532, 548 (C. A. 2), certiorari denied, 263 U. S. 713; *American Exch. Nat. Bank* v. *Garvan*, 273 Fed. 43 (C. A. 2), affirmed *sub nom. Simon* v. *American Exchange Nat. Bank*, 260 U. S. 706; *Miller* v. *Rouse*, 276 Fed. 715 (S. D. N. Y.); *Kohn* v. *Jacob & Josef Kohn*, 264 Fed. 253 (S. D. N. Y.).

an enemy." Section 7(c) (Appendix, *infra*, p. 56), as already noted, authorizes seizure of "any * * * property including * * * choses in action, and rights and claims of every character and description." Section 7(e) (Appendix, *infra*, p. 57), dealing with the discharge of the obligation paid over to the Custodian, provides that the Custodian "shall, in case of payment to * * * [him] of any debt or obligation owed to an enemy * * *, deliver up any notes, bonds, or other evidences of indebtedness or obligation * * * that may have come into [his] possession * * *."[4]

There is nothing in the language of Section 7 which restricts the power to seize debts evidenced by bonds or negotiable instruments to cases where the instruments themselves are seized. Indeed, the wording of Section 7(e), just quoted, clearly contemplates that there will be seizures of bonded debts even when the bonds themselves are not

[4] Since the statutory language is clear, there is little need to refer to the legislative history. See *Ex Parte Collett*, 337 U. S. 55, 61, and cases there cited. Nevertheless, a reference to statements on the floor of the House confirms that the inclusion of debts evidenced by bonds was contemplated from the outset. See *e. g.*, the statements of Representative Esch, a member of the Committee on Interstate and Foreign Commerce, which reported the bill. 55 Cong. Rec., pp. 4864, 4972. See also the observations of Representative Hill who argued against the taking of "stocks and bonds owned abroad" (Idem, p. 4844) and added that in any event private issues should not be given the same treatment as "United States Government bonds in Germany. There * * * the Government has a right to step in * * *." *Idem*, p. 4864.

within reach.[5] The authority to reach a bonded indebtedness without seizure of the bond itself is explicitly recognized by the provisions of Section 9(n) of the Act. 45 Stat. 272, 50 U. S. C. App. 9(n), Appendix, p. 58. That Section was added in 1928 by the Settlement of War Claims Act which provided in general for the return of 80% of all seized property. For the cases where a stock or bond interest had been seized without actual seizure of the stock certificate or the bond, Section 9(n) provided for an 80% return to the current owner of the instrument.[6] By this provision, Congress in terms affirmed the Custodian's power to seize an interest represented by a bond irrespective of whether he had taken the actual instrument.[7]

[5] With respect to other forms of property, reduction to possession is not essential to seizure of title. Seizure of title was effected during World War I by service of a "demand" (*Application of Miller*, 288 Fed. 760, 766 (C. A. 2)), and during World War II by publication of a vesting order in the Federal Register. 8 C. F. R. Section 504.1. Compare *Silesian-American Corp.* v. *Clark*, 332 U. S. 469.

[6] Section 9(n) provides:

> "In the case of property consisting of stock or other interest in any corporation * * * or of bonded or other indebtedness thereof, evidenced by certificates of stock or by bonds * * * where the right, title, and interest in the property (but not the actual certificate or bond * * *) was * * * seized by [the Custodian]," the current owner would be entitled to an 80 per cent return as provided in Section 9(b).

[7] Congressional awareness of the authority to seize stock and bond interests without seizure of the actual instrument

The recent history of Section 5(b) likewise shows an intention to cover bonds, particularly bonds which might otherwise be negotiated abroad. Following the Nazi invasion of Denmark and Norway in April 1940, the President, declaring a national emergency, issued Executive Order No. 8389 (5 F. R. 1400, April 10, 1940) under the authority of Section 5(b), as amended by the Emergency Banking Act of March 9, 1933, 48 Stat. 1. The Order subjected to licensing controls transactions involving funds in which nationals of the invaded countries had any interest, thereby preventing the Axis from swallowing the American assets of such

---

is shown by Sen. Rep. No. 23, 70th Cong., 1st Sess., p. 30, which states:

> Subsection (n) meets the situation which has arisen by reason of the fact that certain corporate interests were seized without obtaining custody of the certificate evidencing those interests. As a result the certificate has been sold in Germany and is being dealt in daily on the German exchanges. Although the committee was convinced that it could not adopt a policy of general recognition of assignments, it seems imperative that this situation be met. Accordingly, subsection (n) provides for the recognition of the various assignments and for payment to the present owner of the certificate. In order to prevent evasion, however, it is necessary to limit the return, irrespective of the citizenship of the present owner, to the 80 per cent. * * *

The House Report contains identical language. H. Rept. No. 17, 70th Cong., 1st Sess., p. 21.

nationals.[8] Certificates of stocks and bonds of American corporations, physically located in the invaded countries, constituted a particularly vulnerable class of property. In order to dispel any doubts regarding the application of Section 5(b) to property in such form, the section was amended by the Joint Resolution of May 7, 1940, 54 Stat. 179, to include expressly "any evidences of indebtedness or of ownership of property."[9]

The legislative discussion of the Joint Resolution shows unmistakably a Congressional purpose to reach certificates of American issue located in the overrun areas.[10] Addressing himself to transfers of stock certificates abroad, Senator Barkley, a member of the Banking and Currency Committee, which reported the Resolution, put the case of a foreigner who—

---

[8] As other countries were invaded or subjected to the domination of the Axis powers, the controls were expanded so that by June 14, 1941, they extended to all of continental Europe. Proclamation 2487, 6 F. R. 2617, May 27, 1941, Executive Order No. 8389, as amended by Executive Order No. 8785, June 14, 1941, 6 F. R. 2897.

[9] There can be no question that bonds were comprehended. See S. Rept. 1496 on S. J. Res. 252, 76th Cong., 3d Sess., and see 86 Cong. Rec. 5179 where Senator Wagner, Chairman of the Banking and Currency Committee, stated: "A bond would be an evidence of indebtedness." See also *United States* v. *Leiner*, 143 F. 2d 298, 300 (C. A. 2).

[10] As to the Congressional purpose to reach transfers abroad, see 86 Cong. Rec. 5906-08, 5168-83; see also Berger and Bittker; *Freezing Controls: The Effects of an Unlicensed Transaction*, 47 Col. L. Rev. 398, 400-401, fn. 17 (1947).

> * * * has a million dollars' worth of stock in General Motors or the Pennsylvania Railroad: The property represented by the stock is in the United States, but the stock may be in the capital of some nation that has been overrun by the troops of another nation.
>
> * * * * * * *
>
> By coercion, or duress, or some other influence, that stock might be delivered up to representatives of the invading government [86 Cong. Rec. 5178].

Senator Connally added:

> * * * the stock certificate might apparently be properly endorsed. It would not show the coercion. * * * The transfer, the endorsement in blank of the certificate, would not reveal the bayonet sticking up right under the fifth rib of the owner of the certificate. [86 Cong. Rec. 5178.]

Nor was the Congress unaware of the usage of treating the certificates as the property itself. Senator Connally was explicit that, notwithstanding that usage, a transfer of a certificate located abroad was covered by the Resolution and could be recognized only if licensed:

> * * * The bankers have raised the point that if evidences of indebtedness and certificates of stock are presented and are properly en-

dorsed, so far as the surface is concerned, they must accept them, though they may have been obtained by duress or through coercion or fraud. How can anyone object to giving the President, through his proper instrumentality, the right to investigate such a case? If such investigation shows that there was a proper transfer, that it was a transfer for value, that it was a transfer in good faith and upon honorable terms, does anyone contend that the President of the United States would decline permission to transfer the title? [86 Cong. Rec. 5179.]

Moreover, when Congress enacted this Joint Resolution of May 7, 1940, it ratified the freeze order which had already been promulgated by the President (Executive Order No. 8389, *supra*, pp. 13-14) and the Treasury regulations implementing that Order (31 C. F. R. 1943 Cum. Supp. § 130).[11] Those regulations defined "property" to include "any debts, indebtedness or obligations, * * * notes, debentures, stocks, bonds * * * any other evidences of title, ownership or indebtedness, * * * negotiable instruments" (*idem.*, § 130.2(c)). They required reports of "all [foreign-owned] property subject to the jurisdiction of the United States" and spe-

[11] See the terms of the Joint Resolution of May 7, 1940, 54 Stat. 179. The Regulations were set out in full in the Congressional Record and were discussed on the floor of the Senate. See 86 Cong. Rec. 5169-5171.

cifically the reporting by every domestic corporation "with respect to any shares of its stock or any of its debentures, * * * bonds, * * * or other obligations" (*idem.*, § 130.4(a)), including bearer bonds. (*Idem.*, § 130, Appendix B, Pub. Cir. No. 4 § III, class B (7)).

In short, when this country entered the war in December 1941, the Congress had already conferred regulatory powers with respect to American securities, including those located abroad, and had ratified regulations which defined "property" to cover bearer bonds located abroad. Several days after the declaration of war, Section 5(b) was again amended (§ 301, First War Powers Act, 1941, 55 Stat. 839), this time to authorize the President to seize and to make affirmative use of the property already subject to controls. It seems obvious that Congress was not, after this country's entry into the war, excepting from the scope of the Act one particular class of property which it had included while the country was at peace.[12]

---

[12] Petitioners' contention that the regulatory and vesting powers conferred by Section 5(b) are not co-extensive (Brief, pp. 24-26) may be correct as far as it goes, but it is irrelevant here. The language of Section 5(b) makes no distinction between jurisdiction to block and jurisdiction to vest on the basis of the type of property involved; any form of property that may be blocked is likewise subject to vesting, if found to be owned by enemy nationals. Similarly beside the mark is petitioners' other contention that in this situation blocking will serve the purposes of the Act better than vesting (Brief, pp. 47, 49-50). The authority granted by Section 5(b) is discretionary (*Clark* v. *Allen*, 331 U. S. 503, 511).

There is not a word in any of these statutory provisions which would warrant attributing to Congress a purpose to except from the broad authority thus conferred the power of the Custodian to seize an interest because it is represented by a negotiable bond or because the holder of the bond is not within the United States. Indeed, to impute such a purpose to Congress would be, *pro tanto*, to frustrate its ultimate aim in enacting the Trading with the Enemy Act:—to permit of seduction "to possession by the United States in furtherance of the war effort" of "any property in this country of any alien." *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 475-476.[13]

---

and when Congress has left a choice of means to executive discretion, the exercise of that discretion is not subject to review. *United States* v. *Bush & Co.*, 310 U. S. 371, 379-380.

[13] The significance which petitioners attach to the provision in Section 7(e) requiring the cancellation of stock certificates representing enemy interests and the issuance in lieu thereof of new certificates, is plainly not justified (Brief pp. 22, 27-28). This provision was added by the Deficiency Appropriation Act of November 4, 1918 (40 Stat. 1020), because of the difficulty created by the provision in Section 12 of the Act making the surrender of the old stock certificates a condition of the issuance of new ones. See *Great Northern Ry. Co.* v. *Sutherland*, 273 U. S. 182, 192-193; *Garvan* v. *Marconi Wireless Telegraph Co.*, 275 Fed. 486, 488-489 (D. N. J.) Cf. *Silesian-American Corp.* v. *Markham*, 156 F. 2d 793, 798 (C. A. 2), affirmed, 332 U. S. 469. No such difficulty existed with respect to bonds. In fact, Section 7(e), a part of the Act as originally adopted dealing with the discharge of an obligation paid to the Custodian, provides as to bonds that only those "that may have come into [his] possession" need be surrendered. See also § 9(n), *supra* p. 12.

It is, of course, true that the property of the alien must be "in this country." *Ibid.* And it is submitted that the court below properly held that that requirement was met in this case. An intangible obligation to pay, whether or not evidenced by a bond or negotiable instrument, has no "situs" in the sense of location in space. See *First Nat. Bank v. Maine*, 284 U. S. 312, 328, 332; Powell, *The Business Situs of Credits*, 28 W. Va. L.Q. 39. What matters for purposes of "jurisdiction", as the decisions of this Court have established, is that the obligor is here and can be made to pay. *Standard Oil Co.* v. *New Jersey*, 341 U. S. 428; *Curry* v. *McCanless*, 307 U. S. 357, 365-367; *State Tax Comm'n* v. *Aldrich*, 316 U. S. 174 (overruling *First Nat. Bank* v. *Maine*, *supra*, on other grounds). In a real sense, there is property here which can be effectively dealt with when an obligor is here. *Harris* v. *Balk*, 198 U. S. 215, 222-223; *Chicago, Rock Island etc. Ry.* v. *Sturm*, 174 U. S. 710, 715-716. Cf. *Canada Southern Ry. Co.* v. *Gebhard*, 109 U. S. 527. The bond itself would be substantially worthless if the United States would not enforce its recognition by the obligor.[14]

[14] The presence of the obligor has been held a sufficient basis for the attachment of a debt represented by a negotiable instrument not itself seized, although many states have statutes which have been interpreted not to permit an attachment in the case of negotiable instruments because of a policy against subjecting the obligor to the danger of double liability. See the cases noted in 28 C. J. S. § 102 and 71 A. L. R. 581.

*Bank of Jasper* v. *First Nat. Bank*, 258 U. S. 112, relied on by petitioners (Brief, 15-17), did not involve the power of a

Petitioners' argument (Brief, pp. 25-26) as to whether the vesting power is limited to property "subject to the jurisdiction of the United States" (Section 5(b)) or to property "within the United States" (Executive Order 9193) is beside the point. For purposes of this case there is no need to choose between the two phrases. Even if we assume for argument that the language quoted from Executive Order 9193 governs and that it is narrower in scope than the wording of Section 5(b), still the obligation evidenced by the bonds in question is property "within the United States" because the obligor is here and can be made to pay.

---

state to authorize the "seizure", such as an attachment, of an underlying obligation by the creditor of a holder of negotiable paper. That case merely concerned the power of a court "to determine the liability of maker to holder" where neither the holder nor the instrument was within the court's jurisdiction.

The absence of World War I cases involving domestic bearer bonds located abroad has not been due to any supposed lack of authority with respect to such bonds. At that time, vesting of bonded debts without seizure of the instruments was the exception because of the difficulty of adequate identification. This difficulty, however, has to a large extent been overcome in World War II by the requirement of the Allied occupying powers that such property be reported by the enemy. Thus, the enemy ownership and serial numbers of the bonds can be readily established. Furthermore, any problem arising out of World War I seizures became to a large extent academic because of the post-war legislation authorizing returns of seized property, as, for example, the Settlement of War Claims Act of 1928 (45 Stat. 254) which, among other things, added Section 9(n) to the Trading with the Enemy Act, see p. 12, *supra*.

While the exact question before the Court has not previously arisen under the Trading with the Enemy Act, it has been presented under earlier confiscation statutes. The fact that a debt was evidenced by a bond not itself taken was not regarded of any consequence for purposes of wartime seizure. See *Ware* v. *Hylton*, 3 Dall. 199, 219-220, 264-265; *Miller* v. *United States*, 11 Wall. 268, 296; *Alexandria* v. *Fairfax*, 95 U. S. 774, 779; *Brown* v. *Kennedy*, 15 Wall. 591; *Pelham* v. *Way*, 15 Wall. 196, 201-202.

Other countries, notably South Africa, Great Britain, and Canada, have taken the same position. *Randfontein Gold Mining Co.* v. *Custodian of Enemy Property*, [1923] So. Afr. L.R., App. Div. 576; *Sutherland* v. *Administrator of German Property* [1934] Court of Appeal, 103 L.J. (K.B.) 244, [1934] 1 K.B. 423, 50 T.L.R. 107, 150 L.T.R. 247; *Canadian Revised Regulations Respecting Trading with the Enemy* (1943).[15] In the *Randfontein* case, *supra*, the South African Custodian vested negotiable bearer shares and bearer bonds of a domestic gold mining company. They were

[15] The Canadian regulations provide for the vesting of "all enemy property." (Reg. 21 (1)). "Property" is defined to include securities (Reg. 1 (i)) which in turn are defined to extend to:

> • • • bonds, debentures • • • or other obligations or rights, whether registered or in bearer form • • • and whether the place of registration or the situs of the certificates or other instruments representing the securities is in Canada or not. [Reg. 1(g)].

held subject to seizure as enemy property even though the certificates were located elsewhere. There, as here, the company refused to comply with the Custodian's demand for the issuance of duplicate certificates, claiming that commercial usage treated the bond as the property and that therefore the property was not within South Africa. That contention was not sustained. It was enough, the Court pointed out, that the corporate debtor by virtue of its existence in South Africa could be made to pay there.

In the analogous situation of the seizure of intangible obligations represented by stock certificates, this Court has upheld the authority of the Custodian to seize though the certificates are beyond his reach: *Silesian-American Corp.* v. *Clark*, 332 U. S. 469; *Great Northern Ry.* v. *Sutherland*, 273 U. S. 182. The same result has been reached even when the certificates are endorsed in blank and hence pass by delivery. *Schrijver* v. *Sutherland*, 19 F. 2d 688 (C. A. D. C.); *B. & O. R. Co.* v. *Sutherland*, 18 F. 2d 560 (C. A. 4).[16]

---

[16] If the Act confers upon the Custodian the authority to vest the obligations in suit, there can be no question of his power to require cancellation of the outstanding bonds and the issuance of new ones. *Silesian-American Corp.* v. *Clark*, 332 U. S. 469. Nor can the provisions of the indentures under which the bonds were issued or those of the Negotiable Instruments Law justify the failure to comply with that requirement. Those provisions do not purport to preclude the exercise of paramount governmental power. "Federal officers and Federal courts are not dependent upon State legislation

For purposes of seizure under the Trading with the Enemy Act, no distinction is warranted between stocks and bonds. The Uniform Stock Transfer Act codifies the mercantile usage of identifying shares of stock with the certificate and of treating the certificate as the property.[17] Yet this does not prevent the seizure during time of war of the underlying shares even though the certificate itself is beyond reach. Commercial convenience should not be permitted to do so in the case of bonds.

The rule that the bond itself is to be treated as the property, and that the "situs" of the obligation

---

for power to lay hold of property." *Miller* v. *United States*, 11 Wall. 268, 297; *Columbia Brewing Co.* v. *Miller*, 281 Fed. 289, 291 (C. A. 5). If any provisions of state law, such as the Negotiable Instruments Law or the Stock Transfer Act, are inconsistent with the exercise of that power they must yield. *Silesian-American Corp.* v. *Clark, supra; Gt. Northern Ry.* v. *Sutherland*, 273 U. S. 182; *Central Hanover Bk. & Trust Co.* v. *Markham*, 68 F. Supp. 829, 831-832 (S. D. N. Y.).

[17] The "fundamental purpose of the whole Act" is to make the certificate, "to the fullest possible, the representative of the share." This "is in accordance with the mercantile usage." Commissioners' Note, 6 U. L. A., p. 2. See also 6 U. L. A. §§ 1, 5, 6, 7(d)(1), 13. For cases in which courts in many contexts have treated the certificate as the property and accordingly have held that shares are not within the "jurisdiction" where the certificates are beyond reach, see *Guaranty Trust Co.* v. *Fentress*, 61 F. 2d 329 (C. A. 7); *Klein* v. *Wilson & Co., Inc.*, 7 F. 2d 769 (D. N. J.), affirmed, 7 F. 2d 777 (C. A. 3); *Elgart* v. *Mintz*, 123 N. J. Eq. 404, 197 Atl. 747. See also *Iron City Savings Bank* v. *Isaacsen*, 158 Va. 609, 635-636, 164 S. E. 520, 528-529.

is the location of the paper, is admittedly a fiction and a statement of the results courts have reached in other contexts for reasons of policy. See the dissenting opinion of Justice Stone in *First National Bank* v. *Maine*, 284 U. S. 312, 332; overruled by *State Tax Comm'n* v. *Aldrich*, 316 U. S. 174. The concept of "situs" is not to be employed to thwart the policy of the United States. *United States v. Pink*, 315 U. S. 203, 234, 240.

In the case of the Trading with the Enemy Act, the purpose of the seizure provisions, as this Court has repeatedly declared, was to reduce to possession all enemy property that can be reached so as to prevent enemy use thereof and to permit affirmative use by the United States. *Propper* v. *Clark*, 337 U. S. 472, 481, 484; *Silesian-American Corp.* v. *Clark*, 332 U. S. 469; *United States* v. *Chemical Foundation*, 272 U. S. 1, 9-10. And it is settled that a commercial practice which conflicts with this purpose must yield. *Silesian-American Corp.* v. *Clark, supra; Great Northern Ry.* v. *Sutherland*, 273 U. S. 182. This may necessitate "some inconvenience to our citizens and others who, as here, are not involved in any actions adverse to the nation's interest." But that fact has not prevented the courts from giving "generous scope" to the power under the Act "to accomplish its purpose." *Propper* v. *Clark*, 337 U. S. 472, 481-482; see also *United States* v. *Chemical Foundation*, 272 U. S. 1,

9-10; *Salamandra Ins. Co.* v. *N. Y. Life Ins. & Trust Co.*, 254 Fed. 852, 860 (S. D. N. Y.).[18]

Implicit in this case are questions of importance far beyond the two bonds here involved, indeed far beyond the large quantities of such property owned by enemies. This case may also determine whether vast amounts of American securities looted by the aggressors from the invaded countries will be permitted to be unloaded. It was precisely with respect to such securities that the federal government's wartime foreign funds control or "freezing" program, although generally relaxed since the surrender of Germany and Japan, has been continued in effect down to the present.[19] Indeed, in accordance with this country's reiterated intention to frustrate the attempts of the enemy and persons dealing with the enemy to profit from wartime loot,[20] the federal government only re-

---

[18] Coupons unmatured at the date of vesting, being "mere incidents of the bonds" (*Williamsburgh Sav. Bank* v. *Town of Solon*, 136 N. Y. 465, [illegible] 32 N. E. 1058, 1062), would seem to be covered by the l[illegible]ge of the vesting order: "any and all rights in, to and [illegible]er said bonds" (R. 8-9). *Cf. Great Northern Ry.* v. *Sutherland*, 273 U. S. 182.

[19] As to the general relaxation of freezing controls, see Alk and Moskovitz, *Removal of United States Controls over Foreign-Owned Property*, 10 Fed. Bar Journal 3 (1948).

[20] *Inter-Allied Declaration Regarding Forced Transfers of Property in Enemy Controlled Territory of January 5, 1943*, Department of State Bulletin, Vol. VIII, No. 185, p. 21; *Resolution No. VI of the United Nations Monetary and Financial Conference at Bretton Woods*, July 1-22, 1944, Department of State Bulletin, Vol. XI, No. 276, p. 384.

cently has strengthened its controls over securities of American issue identified on a schedule, first promulgated in July 1947, as having been looted.[21] All such securities, in which trading is forbidden, are required to be deposited with the Federal Reserve Bank of New York within a specified period of time. And this applies to domestic scheduled securities, wherever located. The Secretary of State and the Attorney General jointly announced, upon issuance of the new amendment to the foreign funds control regulations, that its purpose is "to enable completion of the program of assisting in the recovery of securities looted by the Germans during the war." Holders who fail to deposit such securities within the required time, the announcement adds, "will face vesting action * * * which will nullify their rights in those securities."[22] In accordance with this program, undeposited securities appearing on the schedule were vested effective October 2, 1951 (Vesting Orders Nos. 18519-18521, 16 F. R. 10097-10102). In a press release accompanying this action, the Attorney General advised that representatives of the "victims of the German looting" are expected to "file claims for the return of [such] securities * * *. Any other person who claims to have any interest in the

[21] General Ruling No. 5B, January 20, 1951, 16 F. R. 539.

[22] Press Release, Department of Justice, January 19, 1951, reprinted in full in the Appendix, pp. 62-66.

vested securities may also file a claim for the return of his interest."[23]

This program rests on the authority conferred by Section 5(b) of the Trading with the Enemy Act. Accordingly, to apply the fiction of treating the paper as the property in this context would do more than provide a sanctuary for enemy investments. It would permit the speculator, who purchased looted securities from the enemy at a heavy discount in the hope of salvaging on them after the war, to win his gamble, and would leave this government without power to render effective assistance to the former owner in the recovery of such securities. This result is certainly not required by the statute.

## II.

### The Application of the Act to Bearer Bonds Raises No Constitutional Question.

Petitioners suggest (Brief, pp. 32-51) that the application of the seizure provisions of the Trading with the Enemy Act to obligations evidenced by bearer bonds raises two constitutional questions: (1) it may take the property rights of alien friends without compensation and without due process of law; and, (2) it may violate the Fifth Amendment by exposing petitioners to a second and therefore double liability abroad for which they could not recover compensation from the United States.

---

[23] Press Release, Department of Justice, October 4, 1951, reprinted in full in the Appendix, pp. 66-68.

### A. *Petitioners Have No Standing to Complain of Any Injury to the Bondholders.*

The short and sufficient answer to the first suggestion is that petitioners have no standing to raise the point. As obligors, they have no property in the vested obligations and no authority to assert whatever rights the obligees have. In an analogous situation, this Court has held that a corporation has no standing to assert the interests of its shareholders. *Stoehr* v. *Wallace,* 255 U. S. 239, 251; *Silesian-American Corporation* v. *Clark,* 332 U. S. 469, 474.[24]

Notwithstanding, petitioners contend (Brief, pp. 33-35) that notice to the holder of the bond by publication in the Federal Register is so inadequate as to invalidate the seizure. The efficacy of the vesting as a seizure, however, would seem to depend upon the notice to the obligor rather than to the obligee. In any event, publication is adequate under the circumstances. A *res* vesting under the Trading with the Enemy Act takes the interests of all persons, wherever located and whether known or unknown. *Stern* v. *Newton,* 180 Misc. 241, 39 N. Y. S. 2d 593. In similar situations, like that of escheat, notice by publication is held sufficient. *Security Bank* v. *California,* 263 U. S. 282, 289-290.

---

[24] Petitioner has even less standing to object to the 2 year period of limitation. Section 33 applies to suits under Section 9(a) by parties claiming an "interest, right, or title" in the property vested.

The Constitution does not require personal service upon unknown claimants. *Tyler* v. *Court of Registration,* 175 Mass. 71, 75, 55 N. E. 812, 813, writ of error dismissed, 179 U. S. 405. Where petitioners have cast their contract in a form which enables the obligee to remain anonymous, and unknown even to the obligor, then notice by publication is "appropriate to the nature of the case." *Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306, 313. By choosing a particular form of contract the parties may not remove their transaction from the reach of the Constitutional power of Congress. *Norman* v. *Baltimore & Ohio R. Co.,* 294 U. S. 240, 307-308. Indeed, by the terms of the Indentures under which these bonds were issued, publication in an "authorized Manhattan newspaper" is all the notice that is required to affect substantial rights of the holders. Such notice is sufficient to call the bonds for redemption prior to maturity and to void coupons maturing subsequent to the redemption date. (See Art. IV of each Indenture. For the sufficiency of notice by publication for other purposes, see Art. XII of each Indenture.)

In any event, as to the two bonds in issue, the ordinarily diligent holder would receive actual notice of the vesting and would have sufficient time to protect his rights by appropriate claim or suit under the Trading with the Enemy Act (Secs. 9, 32). The interest on each of the bonds is payable semi-annually (see Art. II, Sec. 2 of each Inden-

ture). In addition, one of the bonds (M 7029) was presented for redemption on January 5, 1950, and bears a legend of the Custodian's action (R. 32-33). The other (M23318) was called for redemption in 1947 (R. 15, 25-26, 30) and matured in 1950 (R. 4, 15). Under these circumstances, the holder was given "a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings * * *." *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553, 562.

B. *The United States Is Not Required to Protect Petitioners Against Possible Imposition of Liability Abroad.*

The Court of Appeals dealt with petitioners' second suggestion by assuming, without deciding, that, if petitioners remained exposed to a second recovery abroad and would have no claim against the Treasury for recoupment, a judgment against them would "take" their property without compensation in violation of the Fifth Amendment. The court met this assumed difficulty by deciding that the petitioners would be entitled to just compensation under those circumstances. (R. 59-60.)

We think there is no necessity for implying such a remedy. The Trading with the Enemy Act expressly exonerates petitioners from any liability, and that exoneration will unquestionably be effective within the United States; it thus affords all the protection that is either possible or necessary in a wartime statute. Any damage that petitioner might suffer by reason of action taken abroad

would be consequential and conjectural, of a type for which the United States is not obliged to provide a remedy. And the question whether and to what extent the United States should protect our citizens from action taken abroad is essentially a political question.

At the outset, we point out that this Court may find it unnecessary to reach the issues raised by this implication of a just compensation remedy. Whether the double liability of which the Court of Appeals spoke will ever arise is conjectural in any case and especially so on the facts of this case (see *infra*, pp. 38-51). In general, this Court "will not anticipate a question of constitutional law in advance of the necessity of deciding it," *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346-7 (concurring opinion); cf. *Silesian-American Corporation* v. *Clark*, 332 U. S. 469, 476.

The issue of just compensation raised by the opinion below, however, raises important questions under the Trading with the Enemy Act. Nothing in the discussion of the point by the court of appeals limits the suggested right to cases involving negotiable instruments; indeed, the very reach of the argument suggests its unsoundness. No reason appears why a second liability abroad might not occur in every instance in which any bailee, trustee, agent, or obligor complies with a vesting order, if he or his property subsequently comes within the jurisdiction of a foreign court. No matter what

type of property is involved, recognition of the seizure and the statutory discharge from consequent liability will still be decided by the foreign court according to its own notions of law and public policy. (See e.g. cases cited at Pet. Br. 37, n. 3.) Because of the importance of the question, and because the court below apparently deemed it necessary to reach it, we shall, in the remainder of this Brief discuss in detail the reasons why we believe the proposed remedy of just compensation is neither proper nor necessary.

1. *The Trading with the Enemy Act exonerates petitioners from liability to the fullest extent necessary.*—During the House hearings in 1917 on the original Trading with the Enemy Act the specific question whether the provisions of the Act would protect obligors against liability abroad was raised, and answered in the negative.[25] The bill was

---

[25] This appears in the testimony of Assistant Attorney General Warren before the House Committee on Interstate and Foreign Commerce. *Hearings on H. R. 4704, Committee on Interstate and Foreign Commerce, 65th Congress, 1st Sess.*, p. 42:

> Mr. Parker: Does the law say that the debtor should be discharged so that if he goes abroad after the war he cannot be sued?
>
> Mr. Warren: No.
>
> Mr. Parker: Should it not? . . .
>
> Mr. Warren: I do not think it is necessary. We considered that question. We had it in one draft of the bill and finally omitted it.
>
> Chairman: That is the effect of the bill?
>
> Mr. Warren: Yes, sir; precisely; that is the effect of the bill itself.

passed, nevertheless, and the action of Congress would seem to justify the inference that in its judgment protection against a second liability in a foreign court was not necessary to constitutionality.

What Congress did was to give complete protection in every court in the United States to the obligor, bailee, agent, trustee, or other person who should comply with the orders of the Custodian. Sections 5 (b) (2) (*infra*, p. 54) and 7 (c) (*infra*, p. 57). There is no doubt that these sections adequately protect the petitioners against a suit within our territory by a holder of these bonds. *Silesian-American Corp.* v. *Clark*, 332 U. S. 469; *Great Northern Ry.* v. *Sutherland*, 273 U. S. 182; *American Exch. Nat. Bank* v. *Garvan*, 273 Fed. 43, 47 (C. A. 2), affirmed *sub nom. Simon* v. *American Exch. Nat. Bank*, 260 U. S. 706.

In addition, Congress provided that any non-enemy claiming any "interest, right, or title" in

---

Mr Sims: Suppose he should go abroad—to the enemy country—and be sued over there, his having paid it to the Federal government of the United States would not deprive the courts of the enemy country of jurisdiction?

Mr. Warren: And no more if the Congress of the United States should put in this clause relieving him.

Mr. Sims: It would have absolutely no effect?

Mr. Warren: That is a matter which must be considered in connection with the treaty provisions.

Mr. Montague: We cannot enact a law which would have extra-territorial effect?

Mr. Warren: No.

property seized or vested by the Custodian might sue for its return under Section 9 (a). The remedy under Section 9 (a) is exclusive (Secs. 7 (c), 9 (f)), and provides only for the return of the property mistakenly vested or its proceeds; it does not provide for payment of just compensation. *Pflueger* v. *United States*, 73 App. D. C. 364, 121 F. 2d 732, certiorari denied, 314 U. S. 617.[26] Yet this Court has held, since 1921, that the remedy provided in Section 9 (a) is as broad as the requirements of the Constitution. *Staehr* v. *Wallace*, 255 U. S. 239; *Becker Co.* v. *Cummings*, 296 U. S. 74; *Clark* v. *Uebersee Finanz-Korp., A. G.*, 332 U. S. 480.[27] In no reported decision, save that of the Court of Appeals in the present case, is there, as far as we have been able to determine, any sug-

---

[26] It has also been held that there is no remedy under the Tucker Act. *Duisberg* v. *United States*, 116 Ct. Cl. 861, 89 F. Supp. 1019, certiorari denied, 340 U. S. 890.

[27] In *Clark* v. *Uebersee Finanz-Korp., A. G.*, the Government, urging that the Act be construed to authorize retention of property of foreign nationals, suggested that as to foreign nationals whose property could not constitutionally be confiscated, the vesting would amount to a "taking" in the constitutional sense for which just compensation should be paid. The Court rejected that contention, holding that Section 9(a) retained its original function as the exclusive and constitutionally adequate remedy under the Act.

gestion that the possibility of a second liability abroad requires any additional remedy.[28]

We find nothing in the implications of the opinion of this Court in *Silesian-American Corporation* v. *Clark*, 332 U. S. 469, to support such a suggestion. This Court, in referring to possible just compensation, was not talking about the remedies of an obligor who paid the Custodian; it was concerned with the remedies available to one whose property had been vested. Moreover, the references in that opinion to "compensation" (332 U. S. at pp. 476, 479-480) would seem to refer to property of friendly aliens which might be requisitioned or commandeered by the United States before the outbreak of war in "reasonable preparation for the storm of war". Before the declaration of war no owner would be an "enemy" within Section 2 of the Act, and the provision of Section 9(a) permitting suit by "any person not an enemy or ally of enemy" would not apply. Presumably in such a situation some provision for compensation would be made.

Of course, the Trading with the Enemy Act does not afford relief for every variety of loss or damage that may result from a vesting, yet it is a con-

---

[28] *Ingenohl* v. *Olsen & Co.*, 273 U. S. 541, cited by petitioners (Brief, pp. 39-40), is no exception. Decided at the same term as *Great Northern Ry.* v. *Sutherland*, 273 U. S. 182, that case involved, not an obligor who paid the Custodian, but a purchaser from the Custodian.

stitutional exercise of the war power of the United States:

> As between the Custodian and citizens, section 9 is enough * * *; so far as they may suffer injury, which that section does not meet, it is a loss that cannot be cured without undue impediment to the national power. [*Kahn* v. *Garvan*, 263 Fed. 909, 916 (S. D. N. Y.).]

2. *Any injury that petitioners may suffer is consequential and conjectural, for which Congress is under no obligation to provide a remedy.* Petitioners suggest (Brief, pp. 35-40) that the vesting of the obligations represented by the bonds in question may be contrary to the Fifth Amendment because the Act does not provide for compensation. The opinion of the Court of Appeals indicated that there would be a taking, but only if and when there should be a recovery on the bonds in a foreign court (R. 59-60).

The difficulty with both of these approaches is to find a "taking". What is taken by the vesting order is the right to receive payment of the bonds, which is the property of the holders, not of the petitioners. If the holders of the bonds are not enemies, they have their remedy under Section 9(a); if they are enemies, there is no obligation to pay compensation to them. *Cummings* v. *Deutsche Bank*, 300 U. S. 115; *Hijo* v. *United States*, 194

U. S. 315; *Deutsch-Australische, etc.* v. *United States*, 59 Ct. Cl. 450, certiorari denied, 277 U. S. 610.

By the vesting, the respondent succeeded to all the rights of the holder "as completely as if by conveyance, transfer or assignment". *Commercial Trust Co.* v. *Miller*, 262 U. S. 51, 56. The payment of the amount of the obligations by the petitioners to the respondent will not constitute a taking for by force of the statute the respondent is a "person duly authorized" to receive payment (*Security Bank* v. *California*, 263 U. S. 282, 285-286) and the petitioners will merely be satisfying contractual obligations they assumed in 1929 and 1930 when they issued the bonds.

Petitioners' argument to the contrary (Brief, pp. 31-32)—that by the vesting the Custodian is calling into being a non-existent obligation and to that extent "takes" their rights, because they never agreed to pay other than in accordance with the indentures—proves too much. To accept that argument would invalidate transfers by operation of law and all vestings under the Act, at least of choses in action. An agreement to pay to "bearer" is no more insulated from the act of the sovereign than an agreement to pay to a named person or to pay in gold. Cf., *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 307-308.

For the reasons just stated, there is on the effective date of the vesting order no "taking" of peti-

tioners' property in the sense of a direct invasion or appropriation.

The Second Circuit did not suggest that either the vesting or the payment to the respondent would in and of itself amount to a "taking"; the suggestion of that court was that the payment to the respondent would become a "taking" only if and when respondents should be compelled to pay a second time in a foreign court. What will immediately work the taking will not be the action of the United States but the subsequent action of a foreign country through its courts. At most, what the United States has done is to create a condition in which such an injury may later come to the petitioners. We have been unable to discover any authority for the proposition that subsequent action by an independent power will make a taking out of what the United States has done within the scope of its constitutional powers.

The loss to the petitioners, if and when it occurs, is not made up of the payment to the respondent but of the second payment abroad; it is property other than that which the United States has received. Such a second recovery abroad is at present entirely hypothetical and conjectural. Any such liability with respect to either of the bonds in suit is extremely unlikely. Bond M 7029 is now held by a New York brokerage house and has been stamped with a legend giving notice of the vesting order (R. 32-33). The other bond, M. 23318, the

whereabouts of which are unknown, is now overdue, having matured in 1950 (R. 33, Indenture of June 2, 1930, p. 1).

Moreover, even if suit is brought abroad on the missing bond or on some other bond the obligation of which has been vested, a second liability of petitioners will eventuate only if there is a rather remarkable coincidence of circumstances. The assumed plaintiff must establish that he is a holder in due course. See, *State of the Netherlands* v. *Federal Reserve Bank*, 99 F. Supp. 655 (S. D. N. Y.). The courts of the country in which he sues may apply the law of the United States, since the bonds were issued here and are payable here, and may recognize the payment to the Custodian as a defense, as the foreign decisions cited in *Compania de Inversiones Int.* v. *Industrial Mortgage Bank*, 269 N. Y. 22, 198 N. E. 617, did with the "gold clause" legislations of 1933.[29] Of course, whether

---

[29] The bonds in question are "gold" bonds, issued in 1929 and 1930. Presumably petitioners would contend that the 1933 legislation was a defense to an action abroad to force payment in gold, while they contend here that the Trading with the Enemy Act, which has been on the statute books since 1917, has no application.

But if the obligation is "subject to the jurisdiction of the United States", so as to permit one statute to work a substantial change in value in 1933, it would also seem "subject" to the extent that another statute in 1949 could require payment to the Custodian in lieu of the holder. In each case, what the statute affects is the obligor-obligee relationship, and in neither case could acquiescence of foreign courts be guaranteed.

the courts of another nation will give any effect to to the provisions of the Trading with Enemy Act is a question they will decide according to their own system of law and their ideas of public policy. See, Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws,* 56 Harv. L. Rev. 30 (1942); Rabel, *Situs Problems in Enemy Property Measures,* 11 Law & Contemp. Prob. 118 (1945). No general statement can be made as to the policies of other nations in which bonds may appear, but the suggestion seems justified that the number of other countries in which petitioners may be subjected to a second liability is not so large as the Court of Appeals seemed to think.

The courts of the nations which are signatories to the Brussels Agreement, discussed *infra,* p. 47, would seem bound to recognize payment to the Custodian as a discharge. It is not unlikely that the courts of other nations which were allied with the United States in the war may do the same, even though their past holdings as to such recognition may be to the contrary. Rabel, *op. cit.,* pp. 123-124. See, *Anderson* v. *Transandine Handelmaatschappij,* 289 N. Y. 9, 43 N. E. 2d 502. And compare *Lorentzen* v. *Lydden & Co.,* [1942] 2 K. B. 202, with *Wolff* v. *Oxholm,* 6 M. & S. 92, 105 Eng. Rep. 1177, and *Ogden* v. *Folliott,* 3 T. R. 726, 100 Eng. Rep. 825. As to the courts of enemy nations, it may be expected that the matter will be taken care of, as it has been in the past, by treaty (see *infra,* pp. 47-49).

So the second liability of petitioners is likely to come to pass, if it does, only if a holder in due course sues them in the courts of a nation that was neutral during the war and which does not admit in its notions of public policy the legality of seizures under the Act, and if in that country the petitioners are amenable to process either by doing business or by having attachable property there.

It is settled that the Fifth Amendment does not bind the United States to indemnify its citizens against losses they may incur by obeying its lawful commands. *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188, 190. Nor is action by the United States which causes "conjectural" or unforeseeable loss compensable under the Amendment. *Sanguinetti* v. *United States*, 264 U. S. 146, 149; *Horstmann Co.* v. *United States*, 257 U. S. 138. Also, if the United States acts within the scope of a constitutional power other than that of eminent domain, although the effect may be to impair substantially or even destroy the value of unappropriated property, there is not a "taking". *Sanguinetti* v. *United States, supra; Omnia Co.* v. *United States*, 261 U. S. 502, 510; *Mitchell* v. *United States*, 267 U. S. 341, 345. Nor is there a "taking" within the Fifth Amendment if the injury or loss to the property of the owner follows only indirectly from the action of the United States; damage which is "incidental", "indirect", or "consequential", however large the amount, does not amount to a "tak-

ing". *Bedford* v. *United States*, 192 U. S. 217, 225; *Mullan Benev. Corp.* v. *United States*, 290 U. S. 89, 94; *Danforth* v. *United States*, 308 U. S. 271, 286.

Eighty years ago this Court, in a case where the injury followed more nearly immediately and directly from the action of the United States, rejected the idea that the just compensation clause of the Fifth Amendment bound the United States to indemnify its citizens for losses. Speaking through Justice Strong, it said:

> That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared? [*Legal Tender Cases*, 12 Wall. 457, 551.]

The suggestion that an implied obligation of the United States to pay just compensation can be

created by the action of a foreign government or court is a novel one and runs counter to established doctrines. It has not been before suggested that the possibility of a second liability in a foreign country may inhibit action otherwise lawful by the United States or by a State. A foreign court which would refuse to recognize the discharge granted by the Act might also impose a second liability in cases in which the proceeding in the United States took the form of escheat,[30] garnishment,[31] bankruptcy or corporate reorganization,[32] or a withholding tax. "Double liability" in this sense is not unusual; it is an inevitable consequence of the fact that there is no international full faith and credit clause. While such a lack may be one of many respects in which present-day international organization is defective, we know of no basis on which it can be said to create an obligation on the part of the United States to pay compensation.

---

[30] See *Security Bank* v. *California*, 263 U. S. 282; *Anderson Nat. Bank* v. *Luckett*, 321 U. S. 233; *Standard Oil Co.* v. *New Jersey*, 341 U. S. 428.

[31] Beale, *The Conflict of Laws* (1935) §§ 108.1 108.4.

[32] Before the days of a federal bankruptcy act a discharge in a state court of insolvency was not good as against nonresident creditors. *Baldwin* v. *Hale*, 1 Wall. 223. And see *Gibbs* v. *Société Industrielle et Commerciale Des Métaux*, 25 Q. B. D. 399. Cf. *Canada Southern R. v. Gebhard*, 109 U. S. 527.

3. *The decision is for Congress whether petitioners should be reimbursed for a liability abroad.*

The decision whether to grant or deny relief for liability or loss abroad is for the "political departments"—the Congress and the Executive—and that decision raises no issue which requires judicial determination. So this Court held in an early "withholding tax" case, *Railroad Co.* v. *Collector*, 100 U. S. 595. An Act of 1866 levied a tax of 5 per cent on the interest paid by railroads on bonds, including that paid to non-residents and aliens. The Act authorized the railroad to deduct the tax paid and withhold it from the payment to the bondholder, and provided that the company would be discharged to that amount. The company paid the tax but also paid the interest (in London) without deduction. It then sued for the return of the tax on the grounds that the provision for deduction and discharge was invalid and that the tax was on non-residents. The Court upheld the tax, saying, in an opinion by Justice Miller (100 U. S. at 598-599):

> Whether, as a question of international law, this declaration would relieve the corporation from the obligation to pay its foreign bondholder the full sum for which it contracted, we need not discuss; for this court, on all such subjects, is bound by the legislative and political departments of its own government. * * * being lawfully assessed and paid, it

cannot be recovered back by reason of any inefficiency or ethical objection to the remedy over against the bondholder.

The same result was reached in *United States* v. *Erie Railway Company*, 106 U. S. 327, in which the United States prevailed in a suit to collect the tax on the authority of *Railroad Co.* v. *Collector, supra.* Justice Bradley, in a concurring opinion (106 U. S. at 703) in which Justice Harlan joined, said as to the objection that the payment of the tax and consequent discharge here might not be respected by foreign governments, that it went only to the propriety or expediency of the tax and was a matter for Congress to decide.

Petitioners attempt to distinguish these cases as dealing only with the problem of the "incidence of taxation" (Brief, pp. 38-39). However that may be, the result reached in those cases accords with the well established rule that the obligation of the United States to protect its citizens or their property abroad is a "political" one, exercised in the discretion of the Executive; it is not a legal obligation enforcible in the courts. See *Shapleigh* v. *Mier*, 299 U. S. 468, 471; Borchard, *Diplomatic Protection of Citizens Abroad* (1927), §§ 15, 138, 143-144, 149, 154. Cf. *Blagge* v. *Balch*, 162 U. S. 439, 454, 457. This is a corollary to the rule that when the citizen goes abroad or sends his property, he submits to the jurisdiction of the laws and courts of the foreign country. *Underhill* v. *Her-*

*nandez,* 168 U. S. 250, 252; Borchard, *op. cit.,* §§ 14, 128; VI Moore, *A Digest of International Law* (1906), pp. 249, 696; II Hackworth, *Digest of International Law* (1941), p. 71. Among other risks he takes that of the loss of his property in the event of war. *Submarine Signal Co.* v. *United States,* 61 Ct. Cl. 652, certiorari denied, 273 U. S. 713; *Green* v. *United States,* 10 Ct. Cl. 466, 471; Cf. *Clark* v. *Williard,* 294 U. S. 211, 213; *Disconto-Gesellschaft* v. *Umbreit,* 208 U. S. 570, 579-580. And, since the decision whether and how to protect the citizen involves the relations of the United States with other nations, it is a "political" one. Moore, *op. cit.,* p. 695. Cf. *United States* v. *Curtiss Wright Corp.,* 299 U. S. 304, 318; *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.,* 333 U. S. 103, 111.[33]

Traditionally, the problem of the protection of the citizen abroad against post-war claims resulting out of wartime seizures has been dealt with on the diplomatic level. To that end, in 1950 Congress added Section 40 to the Trading with the Enemy Act, Act of September 28, 1950, 64 Stat. 1079 (50 U. S. C., Supp. IV, 40). That section authorizes the negotiation of agreements to settle "intercus-

[33] Congress has on occasion, to promote specific objectives, authorized the United States to assume some or all of the special risks incident to doing business abroad. *Cf.* The E. C. A. guarantee program, Sec. 111(b) of the Economic Cooperation Act of 1948, 62 Stat. 143, as amended, 64 Stat. 198, 22 U. S. C., Supp. IV, 1509(b). It deliberately chose not to do so in the Trading with the Enemy Act. See pp. 32-

todial conflicts" concerning enemy property. The United States has entered into one such agreement, the Brussels Agreement of December 5, 1947, to which the United States and Belgium, Canada, Denmark, Luxembourg, and the Netherlands are parties, and which became effective February 1, 1951. That agreement deals specifically with the problem presented by bearer bonds which have been issued by one or more parties to it. Article I of the Annex defines a "security" to include bonds, "whether in registered or in bearer form", and provides that the certificate shall go to the government in whose territory the issuer is located. That is, if the United States vests the obligation represented by a bond of American issue and the Netherlands seizes the bond itself, the certificate is to be released to the United States. This same rule is applied to other negotiable instruments. Annex, Art. 3.[34]

Earlier attempts to deal with the problem of post-war claims have also been in the diplomatic sphere. The problem is a characteristic subject of treaty provisions.[35] Provisions dealing with claims arising out of the vesting or seizure of "external assets" are found in the post-World War II

---

[34] The text of the Agreement is set forth in *State Department Bulletin*, January 4, 1948, Vol. 18, No. 444, p. 6; Article I of the Annex appears on p. 7 and Article 3 on p. 8. For announcement of the going into effect of the Agreement, see *State Department Bulletin*, Feb. 19, 1951, Vol. 24, No. 607, p. 293.

[35] See the testimony of Assistant Attorney General Warren in 1917, *supra*, pp. 32-33, p. 25.

Treaties with Italy (61 Stat. (Part 2) 1369), Roumania (61 Stat. (Part 2) 1799), Bulgaria (61 Stat. (Part 2) 1953), and Hungary (61 Stat. (Part 2) 2109), as well as in the as-yet unratified treaty with Japan.[36] In a closely related field, claims of the inhabitants of Germany are dealt with in Law No. 63 of the Allied High Commission, dated August 31, 1951.[37]

The problem was dealt with comprehensively in the same manner following World War I. The Treaty of Berlin (42 Stat. 1939), signed in 1921, outlawed suits by former enemy nationals in the courts of their own country or elsewhere. That Treaty (Arts. I and II) incorporated certain provisions of the Treaty of Versailles, including those of Articles 297 and 298 and the Annex, by which, *inter alia*, it was agreed that "no claim or action" should be brought "by any German national wherever resident" against any Allied or Associated Power or against any person "in respect of any act * * * with regard to his property" under "exceptional war measures".[38] These provisions

[36] The text of the Treaty is found in *Department of State Bulletin*, Vol. 25, August 27, 1951, pp. 349-354.

[37] Law No. 63, Clarifying the Status of German External Assets, etc. Official Gazette of the Allied High Commission for Germany, No. 64, Sept. 5, 1951.

[38] The important provisions are quoted in *Klein* v. *Palmer*, 18 F. 2d 932 (C. A. 2). For application of the provisions by the courts of this country see also, *United States* v. *Chemical Foundation*, 272 U. S. 1, 11; *Munich Reinsurance Co.* v. *First Reinsurance Co.*, 6 F. 2d 742, 747-749 (C. A. 2).

would plainly have barred any "claim or action" against the obligor of a bond for recognizing a seizure by the Custodian and either paying him or issuing a new instrument to him.

The primary importance of these agreements and treaties is that they show that historically, in the course of dealing with "post-war" claims as a practical matter, the United States has always sought to protect the property abroad of its citizens by means of diplomacy. Neither in World War I nor in the present conflict, until the opinion of the Court of Appeals in this case, has there been any suggestion that the Constitution imposes upon the United States a judicially cognizable obligation to respond for such losses, that it must choose between providing recourse for those who may be held twice liable or foregoing seizure as a weapon of economic warfare.

Secondarily, the agreements and treaties are important in providing a basis for the assessment of the risk to which the petitioners are subjected. On the evidence, it appears that the Court of Appeals went too far in saying that it "is to the last degree uncertain whether * * * any foreign court" will accept payment to the Custodian as a valid discharge (R. 59). The probability is that a number of foreign courts will.[39] That petitioners *may* be held liable in some courts is admitted; no absolute assurance can be given or is required.

---

[39] See also, *supra*, p. 40.

"The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable". *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 145.

## CONCLUSION

The obligations vested were property within the United States which the Custodian was authorized to vest and enforce. The vesting of the obligations meets no constitutional objection and raises no duty on the part of the United States to pay just compensation in the unlikely event petitioners are held liable abroad.

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

PHILIP B. PERLMAN,
*Solictor General*

HAROLD I. BAYNTON,
*Assistant Attorney General*

JAMES D. HILL,
GEORGE B. SEARLS,
IRWIN A. SEIBEL,
*Attorneys.*

DECEMBER, 1951

## APPENDIX

1. Joint Resolution of May 7, 1940, 54 Stat. 179:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person to furnish under oath, complete information relative to any transaction

referred to in this subdivision or to any property in which any such foreign state, national or political subdivision has any interest, including the production of any books of account, contracts, letters, or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed."

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

* * * * * *

2. Trading With the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. 1, et seq:

* * * * * *

Sec. 5, as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App. 616:

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of

credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property, shall be held, used, adminstered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the

manner herein above provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

SEC. 7.

(a) * * *

Any person in the United States who holds or has or shall hold or have custody or control of any property beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or ally of enemy, or of any person whom he may have reasonable cause to believe to be an enemy or ally of enemy and any person in the United States who is or shall be indebted in any way to an enemy or ally of

enemy, or to any person whom he may have reasonable cause to believe to be an enemy or ally of enemy, shall, with such exceptions and under such rules and regulations as the President shall prescribe, and within thirty days after the passage of this Act, or within thirty days after such property shall come within his custody or control, or after such debt shall become due, report the fact to the Alien Property Custodian by written statement under oath containing such particulars as said custodian shall require. * * *

(b) Nothing in this Act contained shall render valid or legal, or be construed to recognize as valid or legal, any act or transaction constituting trade with, to, from, for or on account of, or on behalf or for the benefit of an enemy performed or engaged in since the beginning of the war and prior to the passage of this Act, or any such act or transaction hereafter performed or engaged in, except as authorized hereunder, which would otherwise have been or be void, illegal, or invalid at law. No conveyance, transfer, delivery, payment, or loan of money or other property, in violation of section three hereof, made after the passage of this Act, and not under license as herein provided shall confer or create any right or remedy in respect thereof; and no person shall by virtue of any assignment, indorse-

ment, or delivery to him of any debt, bill, note, or other obligation or chose in action by, from, or on behalf of, or on account of, or for the benefit of an enemy or ally of enemy have any right or remedy against the debtor, obligor, or other person liable to pay, fulfill, or perform the same unless said assignment, indorsement, or delivery was made prior to the beginning of the war or shall be made under license as herein provided, or unless, if made after the beginning of the war and prior to the date of passage of this Act, the person to whom the same was made shall prove lack of knowledge and of reasonable cause to believe on his part that the same was made by, from or on behalf of, or on account of, or for the benefit of an enemy or ally of enemy; and any person who knowingly pays, discharges, or satisfies any such debt, note, bill, or other obligation or chose in action shall, on conviction thereof, be deemed to violate section three hereof * * *.

* * * * * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, or on account of, or on behalf

of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall held, administered and disposed of as elsewhere provided in this Act.

* * * * * *

(e) No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.

Any payment, conveyance, transfer, assignment, or delivery of money or property made to the Alien Property Custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. The Alien Property Custodian and such other persons as the President may appoint shall have power to execute, acknowledge, and deliver any such instrument or instruments as may be necessary or proper to evidence upon the record or otherwise such acquittance and discharge, and shall, in case of payment to the

Alien Property Custodian of any debt or obligation owed to an enemy or ally of enemy, deliver up any notes, bonds, or other evidences of indebtedness or obligation, or any security therefor in which such enemy or ally of enemy had any right or interest that may have come into the possession of the Alien Property Custodian, with like effect as if he or they, respectively, were duly appointed by the enemy or ally of enemy, creditor, or obligee. * * *

SEC. 9.

* * * * * * *

(n) In the case of property consisting of stock or other interest in any corporation, association, company, or trust, or of bonded or other indebtedness thereof, evidenced by certificates of stock or by bonds or by other certificates of interest therein or indebtedness thereof, or consisting of dividends or interest or other accruals thereon, where the right, title, and interest in the property (but not the actual certificate or bond or other certificate of interest or indebtedness) was conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or seized by him, if the President determines that the owner thereof or of any interest therein has acquired such ownership by assignment, transfer, or sale of such certificate or bond or other cer-

tificate of interest or indebtedness, (it being the intent of this subsection that such assignment, transfer, or sale shall not be deemed invalid hereunder by reason of such conveyance, transfer, assignment, delivery, or payment to the Alien Property Custodian or seizure by him) and that the written consent provided for in subsection (m) has been filed, then the President may make in respect of such property an order of the same character, upon the same conditions, and with the same effect, as in cases provided for in subsection (b), including the benefits of subsection (c).

SEC. 40 [50 U. S. C. App., Supp. IV, 40]. The President, or such officer or agency as he may designate, is authorized to conclude and give effect to agreements to further the amicable and expeditious settlement of intercustodial conflicts involving enemy property * * *

3. Executive Order No. 9095, March 11, 1942, 7 F. R. 1971, as amended by Executive Order No. 9193, July 6, 1942, 7 F. R. 5205, and by Executive Order No. 9567, June 8, 1945, 10 F. R. 6917:

* * * * * * *

1. There is hereby established in the Office for Emergency Management of the Executive Office of the President the Office of Alien Property Custodian, at the head of which shall be an Alien Property Custodian appointed by the President. * * *

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

* * * * * *

(c) Any other property or interest within the United States of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, a designated enemy country or national thereof: *Provided, however,* That with respect to any such country or national other than Germany or Japan or any national thereof, such property or interest shall not include cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange, and securities except to the extent that the Alien Property Custodian determines that such cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange, and securities are necessary for the maintenance or safeguarding of other property belonging to the same designated enemy country or the same national thereof and subject to vesting pursuant to section 2 hereof;

* * * * * *

12. Any orders, regulations, rulings, instructions, licenses or other actions issued or taken by any person, agency or instrumentality referred to in this Executive Order, shall be final and conclusive as to the power of such person, agency, or instrumentality to exercise any of the power or authority conferred upon me by sections 3 (a) and 5 (b) of the Trading with the Enemy Act, as amended; and to the extent necessary and appropriate to enable them to perform their duties and functions hereunder, the Secretary of the Treasury and the Alien Property Custodian shall be deemed to be authorized to exercise severally any and all authority, rights, privileges and powers conferred on the President by sections 3 (a) and 5 (b) of the Trading with the Enemy Act of October 6, 1917, as amended, and by sections 301 and 302 of Title III of the First War Powers Act, 1941, approved December 18, 1941. No persons affected by any order, regulation, ruling, instruction, license or other action issued or taken by either the Secretary of the Treasury or the Alien Property Custodian shall be entitled to challenge the validity thereof or otherwise excuse his actions, or failure to act, on the ground that pursuant to the provisions of this Executive Order, such order, regulation, ruling, instruction, license or other action was within the jurisdiction of the Alien

Property Custodian rather than the Secretary of the Treasury or vice versa.

4. Department of Justice press releases:

A. January 19, 1951.

Attorney General J. Howard McGrath and Secretary of State Dean Acheson today announced important changes in the foreign funds blocking controls by the amendment of General Ruling No. 5 and the issuance of a new General Ruling No. 5B which are designed to enable completion of the program of assisting in the recovery of securities looted by the Germans during the war. They stated that holders of securities which are listed in the appendix to General Ruling No. 5B will face vesting action at the end of six months which will nullify their rights in those securities if they do not deposit them promptly with the Federal Reserve Bank of New York.

Harold I. Baynton, Assistant Attorney General and Director of the Office of Alien Property, Department of Justice, explained that the list of looted securities, which was appended to General Ruling No. 5 before the new amendment, has been revised by transferring therefrom to the list appended to General Ruling No. 5B all securities of United States issue and designating them as "domestic scheduled securities." The only securities

which remain in the list appended to General Ruling No. 5, he explained, are those of foreign issue which are described as "foreign scheduled securities." Mr. Baynton stated that the domestic scheduled securities which are not deposited with the Federal Reserve Bank of New York, as stipulated by the new ruling, will be canceled and new certificates required to be issued in replacement. He added that an opportunity will be provided for the victims of looting to assert their claims to the new certificates as well as to those securities which are deposited.

The policy of restoring enemy looted securities, said Mr. Baynton, was expressed in the Inter-Allied Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory, of January 5, 1943, and in Resolution No. VI of the United Nations Monetary and Financial Conference held at Bretton Woods July 1 to 22, 1944, in both of which the United States joined. In line with this declared policy, he stated, a list of scheduled securities was promulgated in July 1947, as part of General Ruling No. 5, representing a compilation of lists of enemy looted securities furnished after termination of hostilities by the governments of countries which had been overrun by the Germans.

The new General Ruling No. 5B, Mr. Baynton explained, makes clear that all trading in domestic scheduled securities is prohibited unless licensed and that the purchaser's lack of actual knowledge of the prohibition against trading is not material. Furthermore, he added, by its terms the new Ruling requires the deposit of all domestic scheduled securities wherever located with the Federal Reserve Bank of New York.

Mr. Baynton emphasized that all persons within the United States holding or receiving securities contained in the list of domestic scheduled securities are required to deposit them in the Federal Reserve Bank of New York either directly or by returning them for that purpose to the persons in the United States from whom they were acquired. Those persons who are not within the United States, he added, are also required to deposit their domestic scheduled securities in the Federeal Reserve Bank if they wish to avoid nullification of their rights in such securities.

Mr. Baynton pointed out that the provisions of General Ruling No. 5 have been changed to make clear that all trading in foreign scheduled securities by persons within the United States or subject to the jurisdiction of the United States is prohibited, and that such persons' lack of actual knowledge of the prohibi-

tion is not material. Individuals within the United States who receive or hold foreign scheduled securities, he added, are required to deposit them with the Federal Reserve Bank of New York and persons outside the United States are permitted to do so. He stated that the ultimate action which will be taken with respect to undeposited foreign scheduled securities has not been determined pending discussions with the countries of issue.

Any depositor of domestic or foreign scheduled securities, Mr. Baynton continued, will have an opportunity to attempt to establish that he is an innocent purchaser and upon establishing that fact to the satisfaction of the Office of Alien Property, the securities deposited by him will be removed from the restrictions imposed against them under the Rulings. Furthermore, he added, any holder may, after depositing them with the Federal Reserve Bank of New York, obtain from the Office of Alien Property the name of the original owner or the government which was responsible for placing them on the lists of domestic and foreign scheduled securities, and work out a settlement with such owner or government in accordance with such rights as he and the original owner of the securities might have. It was further stated by Mr. Baynton that the Netherlands Government, which had reported

for inclusion in the lists a large majority of the securities now contained therein, has advised the Office of Alien Property that it maintains an office at 25 Broadway, New York, New York, which is authorized to effect such settlements.

A press release is being issued by the State Department, in coordination with the Department of Justice, announcing the signing of a "Memorandum of Understanding between the Government of the United States of America and the Government of the Netherlands regarding claims by the Government of the Netherlands to looted securities." The memorandum sets forth the arrangements between the United States and The Netherlands with respect to domestic and foreign scheduled securities by The Netherlands.

B. October 4, 1951.

Attorney General J. Howard McGrath announced today that in accordance with the program made public on January 19, 1951 the Department of Justice has vested approximately $3,000,000 of securities of United States issue reported to have been looted by the Germans during the occupation of the Netherlands. These securities are included in the list of "domestic scheduled securities" appended to General Ruling No. 5B and have not

been deposited with the Federal Reserve Bank of New York in accordance with the provisions of that Ruling. As a result of this action, the United States Government has taken title to the vested securities and the rights of the holders of such securities have been nullified.

Harold I. Baynton, Assistant Attorney General, Director, Office of Alien Property, Department of Justice, stated that the program made public on January 19, 1951 was designed to enable the completion of this Government's efforts to assist in the recovery of securities looted by the Germans during the war. The policy of restoring enemy looted securities was expressed in the Inter-Allied Declaration Regarding Forced Transfers in Enemy-Controlled Territory, of January 5, 1943, and in Resolution No. VI of the United Nations Monetary and Financial Conference held at Bretton Woods July 1 to 22, 1944, in both of which the United States joined.

Mr. Baynton pointed out that the vesting action, which applies to the securities looted from The Netherlands, covers most of the securities on the list of domestic scheduled securities and that the remaining domestic scheduled securities which have not been deposited with the Federal Reserve Bank of New York and which were reported by other foreign